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No. _____

In The
Supreme Court of The United States
October Term 1998

MICHAEL JOHN WARN, et al.,
Petitioners,

v.

M/Y MARIDOME, et al.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can an ocean-going vessel that bases its operations in the United States while flying a foreign flag of convenience avoid jurisdiction under the Jones Act for injuries to its seamen simply by hiring foreign rather than American seaman?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The appellants in the Court of Appeals were Michael John Warn, as personal representative of the Estate of Nicholas Warn, decedent; Gloria Warn Wyeth; Lee Warn; Melanie Warn; Nathan Warn; Christine Willshaw, as personal representative of the Estate of Simon Paul Willshaw; Frederick Willshaw; and Richard Brooks, an individual on behalf of himself.

The appellees in the Court of Appeals were M/Y Maridome, her Engines, Tackle, Apparel, Furniture and Appurtenances, in rem; Maridome Marine Limited, a corporation, in personam; James Boos, in personam; and Boston Whaler, Inc., a corporation, in personam.

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The opinion of the United States District Court for the Southern District of California is Warn v. Maridome, 961 F.Supp. 1357 (S.D.Cal. 1997). Appendix A-1. The opinion of the United States Court of Appeals for the Ninth Circuit is Warn v. Maridome, 169 F.3d 625 (9th Cir. 1999). Appendix B-56.

STATEMENT OF JURISDICTION

The Court of Appeals' opinion in this matter was filed on March 3, 1999. A timely petition for rehearing was filed on March 16, 1999. The Court of Appeals denied the petition for rehearing on April 14, 1999. Appendix B-72. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

46 U.S.C. 688, whose text appears in the Appendix.

STATEMENT OF THE CASE

A. Introduction and Summary of Argument

This petition stems from a suit brought under the Jones Act, 46 U.S.C. §688, et seq., by one injured seaman and the estates of two others who were killed when an overloaded 21-foot tender piloted by an intoxicated seaman from the M/Y Maridome at an excessive speed in 2 1/2 feet of water crashed into a 150 foot metal structure in a harbor in Greece. The tender had been dispatched from the M/Y Maridome to transport seamen from shore.

The Maridome is a 177-foot luxury yacht captained by James Boos, an American citizen licensed by the US Coast Guard. The yacht is beneficially owned by Enrique Molina, a citizen of Mexico and CEO of GEMEX, a New York Stock Exchange company which is the largest bottler of Pepsi in the world outside the United States. Molina used the yacht to entertain high ranking American business executives and investment bankers. For tax purposes, Molina established a shell corporation in the British Channel Islands to assume nominal ownership of the vessel and flagged the vessel in Great Britain. Other than this, the vessel had no significant contact of any kind with Great Britain.

Molina based the operations of the vessel in the country where he had important business contacts -- the United

States. For seventeen months prior to the accident, Maridome was managed from the state of Virginia by the yacht's former captain, Peter Lee. Lee formed a Virginia corporation to manage the yacht's operations. Through that corporation, Lee hired crew members, managed the vessel's finances, ordered supplies and provisions, paid the vessel's expenses through a US bank in Texas, ordered supplies and other provisions from US vendors, arranged for satellite service through a Florida corporation, established the vessel's only permanent mailing address in Florida, and purchased and installed the tender which was involved in the fatal accident which gave rise to this action. The Maridome thus purposefully based its operations in the United States, availing itself of goods and services sold and offered by U.S. companies and U.S.banks and invoking the benefits and protections of U.S. laws. But when it was arrested in San Diego while undergoing repairs and sued in U.S. court for injuries it caused, the Maridome's owner claimed its contacts with the United States were not sufficiently substantial to provide jurisdiction under the Jones Act. The lower courts agreed, although it is clear that their decisions would have been different if any of the petitioners in this case had been American rather than foreign seamen since American seamen injured while working for a vessel that is based here would be allowed to sue under United States law.

This Court has on two occasions this century construed the factors that bear on jurisdiction under the Jones Act. The first was almost half a century ago. Lauritzen v. Larsen, 345 U.S. 571 (1953). The most recent was almost 30 years ago. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970). Petitioners submit that it is time for this Court to revisit the question of Jones Act jurisdiction for three reasons.

First, while both Lauritzen and Rhoditis reflected the realities of the maritime world at the times they were decided, that world has been drastically altered by recent advances in communications and business practice of the sort which have given rise to multinational corporations. These advances allow vessels to be operated effectively in one country, be flagged in another, be owned beneficially by a person who resides in a third, and be owned nominally in a country other than the one in which the beneficial owner resides. Petitioners ask the Court to revisit the Jones Act again to bring its jurisdictional requirements into conformity with current practices in the maritime world.

Second, as petitioners will show, the Circuit Courts' and state courts' efforts during the past 29 years to weigh and balance the jurisdictional factors set forth in Lauritzen and Rhoditis have created a body of case law which is conflicting, and inconsistent. In particular, there is a conflict in the case law construing the significance of the Jones Act jurisdictional factor of "base of operations".

Cases from the Second and Fifth Circuits, and from state courts, have found this factor, when present, to virtually mandate the imposition of jurisdiction under the Jones Act. The Ninth Circuit, on the other hand, continues to find that the law of the flag is "potentially dispositive", and that it "presumptively controls." Apdx B-66. The Ninth Circuit has not fully recognized that the importance once given to the vessel's flag has been undermined by the now-common practice, employed here, of using flags of convenience, i.e., flagging a vessel in a country where it is neither beneficially owned, nor operated. Thus, the Ninth Circuit's opinion allows foreign vessels to operate from the United States and enjoy the benefits of our resources and laws, yet avoid the concomitant burdens of the Jones Act.

The conflict among the circuits and the state courts has created an untenable situation where the imposition of Jones Act jurisdiction depends upon the fortuity of where a vessel is found at the time of its arrest. In this case, had the Maridome been undergoing repairs in the Atlantic or the Gulf of Mexico at the time of its arrest, rather than in the Pacific, it is highly likely that plaintiffs would have been permitted to pursue their claims under the Jones Act.

It is important to re-examine the jurisdictional factors that apply to the Jones Act for a third reason. In 1982, twelve years after Rhoditis was decided, Congress amended the Jones Act to preclude jurisdiction over claims by foreign plaintiffs who were injured outside U.S.territorial

waters while working on off-shore oil drilling rigs or pipelines. 46 USC § 688(b). Apdx C-74,75. Significantly, Congress did not eliminate jurisdiction under the Jones Act for the claims of foreign seamen injured on ocean-going vessels, such as plaintiffs herein and their decedents. Congress recognized that depriving foreign seamen on ocean-going vessels of access to American courts would only serve to encourage employers to hire foreign rather than American seamen in order to avoid their obligations under the Jones Act, a result which would undermine the express purpose of the Act.

B. Facts

1. The M/Y Maridome's U.S. Base of Operations

The M/Y Maridome (Maridome) is a 177-foot luxury yacht nominally owned by Maridome Marine Limited (MML), a Channel Islands (U.K.) company. MML has issued and sold only two shares of stock, for $1.00 each. The shareholders hold their two $1.00 shares as nominees for MML's true owner, Enrique Molina, and have agreed in writing to transfer the stock to Molina on demand. Molina is the C.E.O. of GEMEX, the largest bottler of Pepsi outside the United States. As he admitted at his deposition, he decided to incorporate on the Isle of Jersey because it is a tax haven.

In August 1992, MML, with $2.00 of paid in capital, acquired the Maridome for $22,100,000. Upon purchasing

the vessel, Molina hired Peter Lee, a resident of Virginia, to captain the Maridome for him. Lee served as captain aboard the vessel from August 1992 until April 1994.

Because MML has no officers, pursuant to its Articles, it can act only through the issuance by its directors of Powers of Attorney to individuals to manage the corporation's affairs. To enable Lee to act on Molina's behalf, MML issued to Lee several formal Powers of Attorney.

During the August 1992-March 1994 period when Lee served as captain aboard the Maridome, there was no shore-side management of the vessel. During this time, all vessel operations were conducted either from the vessel itself or from the United States. For example, Lee arranged for the vessel's mail service to be handled by a company in Fort Lauderdale, Florida. Substantially all the business and personal mail directed to the captain and crew was sent to the vessel's "permanent address" in Fort Lauderdale, then forwarded to the vessel. The vessel has never used a British address for its mail.

In September 1993 MML issued written general powers of attorney to Lee "to manage the M/Y Maridome." As the District Court noted, the powers of attorney empowered Lee "to manage and operate the ship in all respects save mortgaging or selling it." Warn v. Maridome, supra, 961 F.Supp. at 1367. Apdx A-15.

The Power of Attorney granting Lee authority to manage the Maridome was not revoked until two days before the accident giving rise to this litigation. At the time of the accident, Lee was the only person who had ever been issued a power of attorney to manage the Maridome.

In late 1993, shortly after receiving the general Power of Attorney to manage the Maridome, Lee told Molina he wanted to resign his captaincy of the vessel and move back to Virginia. Lee and Molina agreed Lee would continue to manage the Maridome from shore in exchange for an annual salary of $100,000. Molina himself acknowledged that Lee was paid $100,000 annually "to supervise Maridome" from Virginia. At Molina's request, Lee formed a Virginia corporation, Marine Management, Inc. (MMI) to manage the Maridome.

Lee returned to his home in Virginia in April 1994. All management services he performed for the Maridome from April 1994 through September 1, 1995, were performed from his residence in Virginia. Throughout the 17 months that Lee managed the Maridome from Virginia, he spent, on average, 30 hours or longer each week working in his office on management matters for the vessel. As the District Court found, Lee "managed the day to day operations of . . . the Maridome from an office in the United States." Warn v. Maridome, supra, 961 F.Supp. at 1367, footnote omitted. Apdx A-16,17.

In order to appreciate fully the broad scope of the

Maridome's U.S. base of operations, it is useful to examine the yacht's operational and management activities category by category.

Financing the Vessel's Operations. All the vessel's operations except insurance were financed from assets which Molina held in the United States. At times when Molina did not advance the vessel sufficient funds to pay its ongoing obligations, Lee advanced funds out of his Virginia corporation's account to pay for the vessel's expenses,

Banking Operations. When Lee moved back to Virginia in 1994, he established an account for the Maridome's operations at NationsBank in Texas. This was the only operating account for the vessel, and Lee was the only one with signature power over the vessel's operating bank account.

Budgeting and Accounting. Lee set up the system of accounts for the Maridome. As part of his management duties from Virginia, Lee checked the captain's work against the budget Lee had prepared.

Crew Hiring. As part of his managing duties, Lee interviewed both Captain Letzen (who replaced Lee) and Captain James Boos (who replaced Letzen). Boos, who was in charge of the Maridome at the time of the accident giving rise to this litigation, was interviewed by both Lee and Molina in Fort Lauderdale and was hired and came aboard the vessel there. During the 17-month period Lee

managed the Maridome from Virginia, the Maridome's written policy was that "no crew members are to be hired without prior notification and agreement of the manager." Part of Lee's management duties from Virginia were to interview potential crew members.

Insurance. When Molina acquired the Maridome in August 1992, he asked Lee to arrange insurance to cover the vessel. Lee selected a Florida company as the Maridome's insurance agent. The Maridome has never used anyone other than American insurance agents to procure its insurance.

Maintenance and Repairs. Lee wrote specifications, obtained quotes and arranged for all major maintenance and repair work on the Maridome as part of his duties as shore side manager. Of the four significant maintenance and repairs the vessel has undergone, three have been in the United States and the fourth in Germany. None occurred in Great Britain. The vessel was undergoing multi-week maintenance work in the Southbay Boatyard in San Diego in October 1996 when it was arrested at the inception of this litigation.

Communications by Mail. Before Lee moved to Virginia, the mail for the ship and crew had been delivered to Maridome's permanent address in Fort Lauderdale. When Lee assumed management duties in Virginia, the vessel and crew began using Lee's Virginia address as the Maridome's address for the delivery and forwarding of mail

and packages. After Lee stopped managing the vessel, Boos reestablished a Fort Lauderdale, Florida, address as Maridome's permanent address for delivery and forwarding of mail and packages. That address appeared on the Maridome's stationery and checks. The vessel has never used a permanent mailing address outside the United States.

SatCom Communications. Lee retained a Miami, Florida company for satellite services.

Fuel and Supplies. While managing the Maridome from Virginia, Lee arranged for fuel supplies by contacting fuel companies, obtaining quotes, arranging for liaison with the yacht, and paying the bills. He was also responsible for the purchase and dispatch of the ship's stores and supplies. The supplier of choice for marine maintenance supplies was Lewis Marine, located in Florida.

Management records. The Maridome's manager, Lee, kept voluminous files which he produced at his deposition. These included 29 separate file folders containing more than 3500 pages of documents.

2. The M/Y Maridome's Travels to U.S.Ports

The Maridome made at least 20 separate trips to U.S. territorial ports during the first four years Molina owned it, both before and after the date of the accident. This was more than twice the number of visits it made to the ports of any other country, including Mexico.

Given the Maridome's U.S. base of operations and extensive U.S. travels, it is not surprising that the vessel's captain and first mate at the time of the accident both are U.S. citizens. They operate the Maridome under licenses issued by the United States Coast Guard.

3. Molina's American Business Activities Aboard The Maridome

Molina, who is C.E.O. of GEMEX, a New York Stock Exchange company which is the largest Pepsi Cola bottler in the world outside the U.S., used the Maridome to entertain U.S. business executives such as the Chairman of PepsiCo and the investment bankers at Goldman-Sachs who do his equity financing. Molina also entertained other business associates aboard the yacht while it was in Fort Lauderdale.

4. Events Preceding the September 3, 1995, Accident and the Accident Itself

Before he was terminated, Lee became concerned about Captain Boos' competence and raised his concerns with Molina and John Falb, Molina's chief financial officer. Five weeks before the accident, Lee faxed Falb a letter accusing Boos of "criminal negligence." On August 30, 1995, four days before the accident, the chief officer of the

Harbor of Poros, where the Maridome was anchored, issued a written "Notice to Appear and Defend Himself" to Boos. In that notice, the Harbor Master accused Captain Boos, "As master of the M/Y Maridome" of permitting his crew members, without proper license, to drive the Maridome's tenders "developing excessive speed and endangering the security of the navigation of the area in general...."

In the early morning hours of September 3, 1995, after drinking heavily for several hours, Chief Engineer Ian McNeil took the helm of the Boston Whaler tender from the watch officer officially in charge. The watch officer was aware of the exact location of the 150 foot metal structure with which the tender later collided. Although the speed limit in the harbor was five knots, and although the tender was overloaded at the time, an intoxicated McNeil proceeded to pilot the tender at a speed of approximately 25 knots when, in approximately two and one-half feet of water, it struck the metal pipe structure, killing Nick Warn, Simon Willshaw, George Florian-Stathopoulous and Andres Brigman, and seriously injuring Richard Brooks.

Immediately after the accident, and notwithstanding his termination, Falb asked Lee to travel to Greece to help represent the Maridome's interests. Lee declined.

5. Management of the Maridome Since the Accident

On September 8, 1995, five days after the accident,

John Falb was issued a power of attorney to manage the Maridome. Falb had no power of attorney to manage the Maridome before or at the time of the accident. Falb is a U.S. citizen with a permanent residence in Dallas, Texas, as well as a Mexico City address in a residence hotel. Falb is a banker. He works full time as chief financial officer and financial director of Molina's group of companies, has never been paid by MML, and has no background or experience managing yachts.

6. Allegiance and Domicile of the Plaintiffs

Plaintiff Brooks and the decedents Willshaw and Warn were citizens of Great Britain at the time of the accident. However, all were seamen who had not resided in Great Britain for several years. Originally, the families of the two Greek-German citizens who also were killed in the accident filed suit as co-plaintiffs. The Greek-German plaintiffs have withdrawn from the appeal of this action with permission of the court. Apdx B-71.

C. The Proceedings Below

On October 17, 1996, petitioners filed a complaint in the United States District Court for the Southern District of California pursuant to 28 U.S.C. sections 1331 and 1333(1) alleging causes of action based on the Jones Act, 46 U.S.C.

section 688 et seq. and general maritime law. On October 30, 1996, an amended complaint was filed adding the manufacturer of the tender as a defendant. On March 17, 1997, the District Court granted the defendants' motion to dismiss for lack of jurisdiction under the Jones Act, the Death on the High Seas Act and general maritime law.

Petitioners appealed. On March 3, 1999, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order dismissing the action. On April 14, 1999, the court denied petitioner's petition for rehearing.

ARGUMENT

A. Introduction

The issue presented for this Court's review is whether an entity which bases its operation and conducts its business transactions in the United States, thereby enjoying the benefits of United States resources and law, can claim its contacts with the United States are not substantial and can avoid being sued under the Jones Act through the expedient of hiring foreign rather than American seaman. The issue turns on the factors that determine Jones Act jurisdiction.

B. The Jones Act and the Jurisdictional Factors

The Jones Act provides, in relevant part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, . . . and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right to trial by jury. . . ." 46 U.S.C. §688(a); emphasis added.

The jurisdiction of an American federal court under the Jones Act is worldwide. It is not limited to American seaman and has been held applicable in numerous cases to foreign seamen sailing on foreign flagged vessels who were injured in accidents occurring outside the United States or its territorial waters.[1] The Jones Act "is for the benefit of

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[1] E.g., Moncado v. Lemuria Shipping Corp., 491 F.2d 470 (2d Cir. 1974) cert. den., 417 U.S. 94 (1974); Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307 (2d Cir. 1976), cert. den., 429 U.S. 1098 (1977); Gomez v. Karavias U.S.A., Inc., 401 F.Supp. 104 (S.D.N.Y. 1975); Pavlou v. Ocean Traders Marine Corp., 211 F.Supp. 320 (S.D.N.Y. 1962); Mattes v. National Hellenic Lines, S.A., 427 F.Supp. 619 (S.D.N.Y. 1977); Rode v. Sedco, Inc., 394 F.Supp. 206 (E.D. Tex. 1975); Groves v. Universe Tankships, Inc., 308 F.Supp. 826 (S.D.N.Y. 1970); Mihalopoulos v. Westwind Africa Line, Ltd., 511 So.2d 771 (La. App. 1987); and Rojas v. Kloster Cruise A/S, 550 So.2d 59, 63-4 (Fla. App. 1989).

seamen against their employers", Claussen v. Gulf Oil Corp., 136 F.Supp. 110, 113 (W.D. Pa. 1955) and is liberally construed in favor of injured seamen. Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942); Williams v. Tide Water Associated Oil Co., 227 F.2d 791, 794 (9th Cir. 1955), cert. den., 350 U.S. 960 (1956).

In Lauritzen v. Larsen, supra, 345 U.S. 571, the Court noted that several nations may claim a connection with an accident on a ship and listed seven factors which are to be considered to determine whether the Jones Act should be applied. Those factors are: (1) the place of the wrongful act; (2) the law of the flag of the vessel; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. Id. at 582- 91. In Hellenic Lines Ltd. v. Rhoditis, supra, 398 U.S. 306, 308, the Court stated that the list of seven factors in Lauritzen was not exhaustive, holding that "the shipowner's base of operations is another factor of importance in determining whether the Jones Act is applicable" (emphasis in original).

The Court also observed in Rhoditis that the Lauritzen test "is not a mechanical one" and that the "significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act

jurisdiction." Rhoditis, supra, 398 U.S. at 308, 309. In conducting this analysis, a fact or group of facts is tested in light of the underlying objective of effectuating the liberal purposes of the Jones Act. Id. at 309, n. 4. The Court recognized that if the liberal purposes of the Jones Act are to be effectuated, "the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States." Id. at 310.

Because under Rhoditis the importance of any factor depends on its relation to the national interest served by the purpose of the Jones Act and on the need to effectuate the liberal purposes of the Jones Act, post-Rhoditis case law has recognized that some of the factors are of relatively little weight while others are of paramount importance. As will be shown, the most important factor is one on which petitioners rely, namely base of operations of the vessel.

The place of the wrongful act "is often of little help." Pereira v. Utah Transport, Inc. 764 F.2d 686, 689 (9th Cir. 1985). "[T]he place of injury typically is not emphasized because vessels frequently navigate over a large number of waters that are subject to a variety of legal authorities." Villar v. Crowley Maritime Corp., 782 F.2d 1478, 1480 (9th Cir. 1986).

In Lauritzen, 345 U.S. at 584, the Court stated: "Perhaps the most venerable and universal rule of maritime

law relevant to our problem is that which gives cardinal importance to the law of the flag." The law of the flag was given great weight because, historically, the flag and the vessel's base of operations were one and the same. However, as Lauritzen itself recognized, a practice has grown in this country of shipowners seeking foreign registration in an effort to avoid the stringent shipping laws of the United States. Lauritzen, 345 U.S. at 587. This practice also has spread elsewhere and it is now the rule that the law of the flag of the vessel is not to be given great weight when the flag is only a "flag of convenience." Southern Cross Steamship Co. v. Firipis, 285 F.2d 651, 653-54 (4th Cir. 1960), cert. den., 365 U.S. 869 (1961) and cases cited.

The allegiance or domicile of the injured is an important consideration. Pereira, 764 F.2d at 689. However, as shown in footnote 1, ante, the Jones Act has been applied in a large number of cases to seamen of foreign countries. And, as petitioners will show, in Rhoditis, the Court found that base of operations outweighed the combination of four factors pointing to Greece including the allegiance/domicile of the plaintiff and the flag.

The allegiance of the shipowner may be misleading in view of the growing practice of owners to avoid stringent shipping laws by seeking registration eagerly offered by some countries. Pereira, 764 F.2d at 689.

The place of the contract is usually fortuitous since "[a] seaman takes his employment, like his fun, where he finds it; a ship takes on crew in any port where it needs them." Lauritzen, 345 U.S. at 588. Accordingly, the place of contracting is a relatively unimportant consideration, Pereira, 764 F.2d at 689, which is given little or no weight. Villar, 782 F.2d at 1478.

The inaccessibility of a foreign forum is "given very little weight." Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82, 85 (9th Cir. 1980), cert. den., 451 U.S. 920 (1991). However, the lack of a readily accessible foreign forum weighs in favor of jurisdiction under the Jones Act. Lauritzen, 345 U.S. at 589-90.

The factor of law of the forum is not one of great weight, and the fact suit was brought in the United States does not necessarily support the application of the Jones Act. Villar, 782 F.2d at 1481.

Since Rhoditis, the vessel's base of operations has been recognized by most courts as the most important factor for determining whether the Jones Act applies to an injury or death on an ocean-going vessel. In Rhoditis, for example, the accident took place in the United States and defendant was a Greek corporation whose base of operations was the United States. More than 95% of the corporation's stock was owned by a Greek citizen who managed the corporation from New York. The plaintiff was a Greek

citizen who signed on in Greece and whose contract of employment provided for application of Greek law. Rhoditis, supra, 398 U.S. at 307-08. The Court observed that the vessel was not a casual visitor to the United States. The Court further observed that there was no reason to give the Jones Act a strained construction so that an alien owner engaged in extensive operations in the United States might have an advantage over United States citizens similarly engaged by allowing him to escape the obligation and responsibility of a Jones Act employer. Id. at 310. The Court held that the flag, the nationality of the seaman, the fact his employment contract was Greek and that he might be compensated there "are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country." Id.

C. Reasons For Granting The Writ

1. The Petition Should Be Granted Because The Opinion Below Elevates Form Over Substance By Granting Primary Importance To Flags Of Convenience While Disregarding This Court's Prior Rulings On The Importance Of Base Of Operations

Even though Rhoditis made base of operations the most important jurisdictional factor, the Ninth Circuit ruled that

the law of the flag is the only one that is "potentially dispositive" and the one that "presumptively governs" unless other factors point decidedly in a different direction. Warn v. Maridome, supra, 169 F.3d at 629. Apdx B-65,66. This view of the flag's importance bears no relationship to the maritime world today. Instead, it reflects a world that was in the process of ending when Lauritzen was decided and which had in fact ended by the time of Rhoditis.

As the Court pointed out in Lauritzen, the rule giving cardinal importance to the flag was a venerable one. Lauritzen at 584. In times past, there was good reason for the rule. During the early part of the 20th century and before, the lack of instant global communications meant that a vessel was, by necessity, flagged, operated and owned in the same country. The flag a vessel flew, in almost all cases, identified both its ownership and its base of operations. It thus made perfect sense to apply the "law of the flag", that is, the law of the vessel's ownership and its base of operations, in cases of injury to the vessel's seamen.

In the latter part of the 20th century however, advances in communication made it possible, and eventually commonplace, to operate a vessel out of one country while flagging it in another, even when the vessel's owners lived in a third. It was after this practice became more widespread that this Court, in Rhoditis, recognized base of operations as an independent factor in determining Jones

Act jurisdiction.

The importance of base of operations is reflected in Rhoditis. There, the Court found base of operations in the United States to outweigh four factors that weighed in favor of jurisdiction in Greece, including the otherwise important factors of the flag and the country of the seaman. Thus even though Lauritzen had stated that the flag traditionally was the most important factor, it was clear by the time of Rhoditis that base of operations was more weighty and would carry the day not only over the flag, but also over the flag combined with several other factors. After Rhoditis, flag and base of operations no longer were synonymous, in fact or in law.

Rhoditis did not address the significance of flags of convenience in the Jones Act jurisdictional analysis. In this case, the British flag flown by the Maridome clearly was a flag of convenience since the vessel's true owner was not British, the vessel was not operated from Britain, and the vessel never called on British ports. "A flag of convenience is a flag flown by a vessel registered in one state, with which the vessel has few or no connections, while in reality the vessel is owned in or operated from another state." Tetley, "The Law of the Flag, 'Flag Shopping', and Choice of Law," 17 Tulane Maritime L.J. 139, 173 (1993) (footnote omitted).

There is little discussion of flags of convenience in the case law, although the Court in Lauritzen recognized that a

practice has grown in this country of shipowners seeking foreign registration in an effort to avoid the more stringent shipping laws of the United States. Lauritzen, 345 U.S. at 587. The practice also has spread elsewhere and it is now the rule that the law of the flag of the vessel is not to be given great weight when the flag is only a "flag of convenience." Firipis, 285 F.2d at 653-54 and cases cited. Thus, flags of convenience are part of "the facade of the operation" which this Court, in Rhoditis, said should be given little weight in light of a vessel's actual contacts with the United States, The problem is that in the absence of clear guidance from this Court, some courts still appear to view flags as legitimate even when the flag is one of convenience.

This case presents such an example. The Ninth Circuit stated that the flag presumptively controls, Warn, 169 F.3d at 629, even though the only reason Molina established nominal corporate ownership of the yacht in Great Britain was to take advantage of the tax haven status provided by the Isle of Jersey. Certiorari should be granted so that the current practice of choosing a flag based on such considerations ceases to be given such unjustified weight.

2. The Petition Should Be Granted Because The Opinion Below Conflicts With Opinions In Other Circuits And State Courts Holding That Base Of Operations Is Of Cardinal Importance In Determining Jurisdiction Under The Jones Act.

Although it is clear from the ruling in Rhoditis that base of operations is the most important jurisdictional factor, Rhoditis did not say so in so many words. This, coupled with the fact that Lauritzen expressly stated that the flag was traditionally viewed as a factor of cardinal importance, has led to a conflict in the case law. The rule in the Ninth Circuit is that even a flag of convenience still presumptively controls. Warn v. Maridome, supra, 169 F.3d at 629. Apdx B-66. The rule in other jurisdictions is that base of operations controls and may be decisive in and of itself. Gonzalez v. Naviera Neptano A.A., 832 F.2d 876, 880 (5th Cir. 1987); Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d. 307 (2d Cir.1976).

In Hernandez v. Naviera Mercante C.A., 716 F. Supp. 939, 943 (E.D. La. 1989) the court stated that the determination of whether American or foreign law applies turns substantially on the base of operations. In Rojas v. Kloster Cruise A/S, 550 So.2d 59 (Fla.App. 1989), the court came to the same result using even more emphatic language: "We think that Rhoditis establishes the rule that the existence of substantial contacts including the existence

of an extensive base of daily operations in the United States -- even when they are less significant than those present here -- itself and alone requires the application of our law to the particular case. This is shown by a series of decisions which so hold, even after a mandated consideration of all the pertinent factors has yielded an overwhelming predomination to the contrary." Id. at 63. The court went on to conclude since the defendant took "economic advantage and benefit from its presence in the United States and the protection of our laws, it must also bear the burdens and obligations imposed by them" and was subject to the Jones Act. Ibid

The District Court below explicitly recognized this conflict in authority, acknowledging that decisions by the Second and Fifth Circuit Courts of Appeal gave greater weight to the shipowner's base of operations than was permitted under decisions rendered by the Ninth Circuit. Warn v. Maridome, supra, 961 F.Supp. at 1370, n.6. Apdx A-25. The result is that if petitioners had sued in New York, Louisiana or Texas, they likely would have been allowed to proceed under the Jones Act, but because they sued in a district court in the Ninth Circuit they cannot. Certiorari should be granted to assure uniform interpretation of the Jones Act.

3. The Petition Should Be Granted Because The Opinion Below Ignores Important Policy Considerations Which Militate In Favor Of Jones Act Jurisdiction In This Case.

There are at least two important policy considerations, ignored by the Court below, which weigh heavily in favor of finding the base of operations factor in this case to be sufficient for Jones Act jurisdiction. The first policy consideration concerns requiring the defendants to accept the burdens along with the benefits of basing their operations in the U.S. The District Court acknowledged in its opinion that the shell corporation that nominally owned the Maridome "purposely availed itself of goods and services offered by U.S. companies, services offered by U.S. banks and services of a U.S. citizen as manager of its vessel. . . . This clearly invoked the protections and benefits of U.S. laws." Warn v. Maridome, supra, 961 F.Supp. at 1368. Petitioners submit that certiorari should be granted to review whether a vessel can operate from the United States, thereby taking advantage of American banking, insurance, mail, supplies, repair and communications resources and the protection of our laws, but avoid the attendant obligations of American operations such as responsibility under the Jones Act.

The second policy consideration concerns the interests of American seamen. See, Rhoditis,supra, at 309: "The significance of one or more factors must be considered in

light of the national interest served by Jones Act jurisdiction." In this connection, the Ninth Circuit's holding in petitioners' case has one additional consequence that deserves the Court's attention. As petitioners have noted, the allegiance or domicile of the injured is an important jurisdictional consideration. Pereira, 764 F.2d at 689. In this case, several seamen on the Maridome were Americans. Fortunately, none of them were injured in the accident. If they had been, there is no doubt the Jones Act would apply since courts have universally applied the Jones Act to claims of American seamen injured on ocean-going vessels with an American bases of operations. The Ninth Circuit's decision in this case sends a clear message that foreign-flagged vessels that base their operations in the U.S. can avoid Jones Act jurisdiction by hiring foreign rather than American seamen. The inevitable result will be to undermine the interests of American seamen by creating an incentive not to hire them.

This obvious deleterious effect on American jobs was expressly recognized by several congressmen at the hearings preceding the amendment to the Jones Act in 1982 which eliminated jurisdiction for the claims of foreign oil workers who were injured while working on drilling platforms or pipelines outside the U.S: " ... We should be doing everything in our power to encourage companies to hire American workers.... It would be clearly more profitable for the oil companies to hire foreign workers who

cannot sue in U.S. courts." Congressional Record, September 28, 1982, p.25423.

When Congress amended the Jones Act in 1982, it deprived foreign oil platform workers of the right to bring Jones Act claims, At the same time, Congress left in place the right of foreign seamen on ocean-going vessels to assert Jones Act claims. The ruling of the Court below deprives plaintiffs of the very right which Congress retained for them. At the same time, the ruling makes it more profitable for maritime employers to hire foreign seamen who cannot assert Jones Act claims

CONCLUSION

Petitioners respectfully ask that certiorari be granted to bring the Jones Act jurisdiction into conformity with maritime practices that have become commonplace in the thirty years since the Court last evaluated the question, to resolve conflicts in the case law, to eliminate the economic advantage in hiring foreign rather than American seamen, and to assure that those who benefit from our freedom, commerce, and law in the operations of their vessels accept the corresponding burdens of doing so.

Respectfully Submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT,
S. D. California
March 31, 1997

Michael John WARN, et al, Plaintiff, v. M/Y MARIDOME, et al., Defendants.	No. CIV 96-1800-B(RBB).

ORDER:

1. DENYING DEFENDANT BOOS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION;

2. GRANTING DEFENDANT MARIDOME MARINE LTD.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION;

3. GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION;

4. DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS MOOT;

5. GRANTING DEFENDANTS' MOTION TO DISMISS

FOR FORUM NON CONVENIENS.

BREWSTER, District Judge.

This matter came on regularly for hearing on defendants' motions to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and for forum non conveniens. Matthew Quint of Wilson & Quint, and Frank Brucculeri of Tabrisky, Brucculeri & Stein appeared for plaintiffs. George Koelzer, Robert Zapf, and Joshua Force of Lane Powell Spears Lubersky LLP appeared for defendants James Boos and Maridome Marine Ltd. Justs Karlson and S. Mark Varney of Carroll, Burdick & McDonough LLP appeared for defendant Boston Whaler Co. After careful consideration of the moving and opposing papers and the oral arguments of counsel, the Court DENIES Boos's motion to dismiss for lack of personal jurisdiction, GRANTS Maridome Marine Ltd's motion to dismiss for lack of personal jurisdiction, GRANTS defendants' motion to dismiss for lack of subject matter jurisdiction, DENIES DEFENDANTS' MOTION to dismiss for failure to state a claim upon which relief can be granted, and GRANTS defendants' motion to dismiss for forum non conveniens.

I. Case Type and Jurisdiction

In an accident off the coast of Greece, several

crewmembers and guests of the M/Y Maridome were killed or seriously injured when its tender collided with a steel structure in the harbor of Port of Poros. Plaintiffs have filed suit against the vessel, in rem, against its captain and owner, in personam, and against the manufacturer of the tender, in personam. Plaintiffs allege causes of action based on the Death on the High Seas Act (DOHSA), 46 U.S.C.App. § 741 et seq., the Jones Act, 42 U.S.C.App. § 688 et seq., and General Maritime Law.

II. Background

A. The M/Y Maridome

The M/Y Maridome ("Maridome") is a 177 foot luxury yacht owned by Maridome Marine Limited("MML") aChannel Islands (U.K.) company. The Maridome is of British Registry and flies the British flag. MML has only issued two shares of stock which are held by nominees for the benefit of Enrique Molina. Molina is the C.E.O. of GEMEX, the largest bottler for Pepsi outside of the United States. Molina lives and does business in Mexico. The ship travels around the world.

The Captain of the Maridome is James Boos ("Boos"), an American citizen who has not lived in the United States in the past twenty years.

MML's board of directors are all British citizens.

Plaintiffs contend that these directors have no responsibility for the management or operation of the Maridome. MML was incorporated in the Channel Islands because they are a tax haven. The attorneys who incorporated MML also serve as its nominal board of directors.

B. Summary of the Accident

On September 3, 1995, the Maridome was anchored off the coast of Port of Poros, Greece. Several crew members were on shore for the evening. In the early morning hours, they radioed the ship and First Engineer Ian MacNeil drove the ship's tender, a 21 foot customized Boston Whaler, to shore. He picked up a large number of passengers and began driving across the harbor. Plaintiffs contend that MacNeil was intoxicated, was traveling at an excessive rate of speed, and that the tender was seriously overloaded. While traveling across the harbor at approximately 25 knots, the tender struck a metal structure lying in shallow water. Passengers Nicholas Warn, George Stathopoulos, Andreas Brigman, and Simon Willshaw were killed in the accident. Richard Brooks was seriously injured.

Warn, Willshaw and Brooks were crewmembers of the Maridome and were citizens of the United Kingdom. They signed employment contracts in Barbados, Gibraltar and St. Martin, respectively. Brigman and Stathopoulos were guests on the tender and were dual citizens of Greece and

Germany.

C. The Instant Action

The estates and family members of the deceased passengers and Richard Brooks have filed suit against the Maridome, MML, James Boos ("Boos"), and Boston Whaler, Inc. ("Whaler"). Plaintiff Brooks asserts causes of action for personal injuries under the Jones Act and maintenance and cure under General Maritime Law. The estates of the other deceased crewmembers sue for wrongful death under the Jones Act. The crewmembers' families bring survival actions under the Jones Act. The guests on board the tender bring wrongful death actions under the Jones Act, and their family members bring survival actions as well. All plaintiffs sue Boston Whaler for negligence and strict liability in the design and manufacture of the tender.

On October 16, 1996, plaintiffs attached the Maridome in San Diego pursuant to Supplemental Rule B for Certain Admiralty and Maritime Claims while it was being repaired. Captain Boos was onboard the vessel when it was attached, and he was personally served with a copy of the summons and complaint in this case. After posting a $15,000,000 bond, the Maridome was released. It left San Diego shortly thereafter.

Defendants Maridome, MML and Boos have filed a motion to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, failure to state a claim upon which

relief can be granted, and forum non conveniens. Defendant Whaler filed a motion to dismiss for forum non conveniens. Since the issues of personal jurisdiction and forum non conveniens are at the heart of this motion, there is a more detailed analysis of the Maridome's contacts with the United States below.

D. Management of the Maridome

Upon purchasing the Maridome, Molina hired Peter Lee ("Lee"), a resident of Virginia, to captain the ship for him. Lee served as captain from August 1992 until April 1994. Lee's duties as captain included hiring the crew, and managing the ship's accounts, repair work, insurance, and all other aspects of the ship's day to day operations. Lee stepped down as captain in April 1994, but remained the manager of the Maridome until August 1995, just days before the accident. During this time, he managed the Maridome out of his home in Virginia. MML provided Lee with a power of attorney which allowed him to manage all aspects of the Maridome, save selling or mortgaging it.

Much of the management of the Maridome occurred in the United States. In February 1994, Lee formed a Virginia corporation, Marine Management, Inc. to manage the Maridome and another of Enrique Molina's yachts, the Esterel. Lee was paid $100,000 per year to manage the crew hiring; supervise repair work; handle ship's mail, parts and

supplies; and to submit monthly budgets and accounting summaries to Molina. During this 18 month period, Lee worked approximately 30 hours per week performing these duties. He maintained over 3500 pages of records in his home office regarding his management of the Maridome. Defendants contend that Falb, Molina's chief financial advisor, actually makes the business decisions regarding the Maridome.

Lee's duties were slowly diminished during 1995, and were terminated completely only two or three days before the accident in Port of Poros, Greece.

Other specific contacts with the United States are listed below:

1. The Maridome has always used U.S. insurance brokers to procure insurance. The insurance was actually placed, however, with underwriters in London, England.
2. The permanent mailing address for the ship's mail has always been in the United States. Parts and other supplies were also sent to this address to be forwarded to the ship.
3. Molina set up a bank account with NationsBank in Texas into which he deposited money for the operation and management of the Maridome. Lee used the money in this account for all of the expenses of the Maddome. When there were insufficient

funds in the account, Lee would advance money from MML accounts in Virginia and would be reimbursed.

4. Four of the five significant repairs that have been performed on the vessel have taken place in the United States.

5. Satellite communications services are provided for the vessel by Seven Seas Communications in Miami, Florida.

6. Lee purchased supplies for the Maridome from Lewis Marine in Florida.

7. The Boston Whaler tender was purchased by MML from Lauderdale Marine in Florida. The tender was also installed in Florida.

8. The Maridome has only stopped in California twice in the past two years: once to refuel and once for repairs. It was during this second stop that the ship was arrested. Similarly, Captain Boos's only two contacts with California are these two visits.

III. Discussion

A. Personal Jurisdiction

1. In Rem and Quasi in Rem Jurisdiction

Defendants MML and Boos move to have the in personam suits against them dismissed for lack of personal jurisdiction. Defendant Maridome is not moving to have the in rem case against it dismissed on jurisdictional grounds. In rem jurisdiction was established when the ship was arrested in this district. The fact that the Court has in rem jurisdiction over the vessel does not mean that the Court has in personam jurisdiction over MML or Captain Boos.

The Supplemental Rule B attachment of the Maridome provides the Court with quasi in rem jurisdiction over MML to the extent of the value of the Maridome. *See Stevedoring Services of America v. Ancora Transport*, 941 F.2d 1378, 1381 (9th Cir.1991), *cert. granted and vacated on other grounds*, 506 U.S. 1043, 113 S.Ct. 955, 122 L.Ed.2d 112 (1993). Maritime attachment pursuant to Rule B has two purposes: (1) "to obtain jurisdiction of the respondent in personam through his property," and (2) "to assure satisfaction of any decree in libelant's favor." *Id.* "Although jurisdiction achieved through maritime attachment is denominated 'in personam,' it is clear that, absent personal service or an appearance by defendant, the judgment had is in the nature of quasi in rem." *Id; see Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982) ("Assets of the owner ... within the jurisdiction today, may be transferred elsewhere or paid off tomorrow. It is for these reasons that...attachment in actions in personam, Supplemental Rule B, [was] developed. These reasons are as

valid today as they ever were.") Once someone's property is attached, the Court has jurisdiction over that person for a judgment up to the value of the property seized. This means that the Court has jurisdiction over MML up to the value of the $15,000,000 bond which has been posted, regardless of whether it is denominated in personam, in rem or quasi in rem jurisdiction.

Quasi in rem jurisdiction under Supplemental Rule B is only available when the defendant's contacts with the forum are insufficient to maintain normal in personam jurisdiction over the defendant. "With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels,...if the defendant shall not be found within the district." Supplemental Rule B(1); *see State of Oregon v. Tug Go Getter*, 398 F.2d 873, 874 (9th Cir. 1968) (finding that defendant had to not be found within the district in order for a Rule B attachment to be proper).

The only effect of MML's challenging personal jurisdiction is that if the Court finds no personal jurisdiction, and a judgment were entered by the Court in excess of the $15,000,000 bond that has been posted, MML would not be liable for a deficiency judgment.

2. Statutory Authority for the Exercise of Personal Jurisdiction

Pursuant to Rule 12(b)(2), a court may dismiss a suit for "lack of jurisdiction over the person." Fed.R.Civ.P. 12(b)(2). The Ninth Circuit has established a two-step test for determining the propriety of asserting personal jurisdiction:

> First, the relevant state's long-arm statute must permit jurisdiction. Second, the exercise of jurisdiction must be consistent with the demands of due process.

Greenspun v. Del E. Webb Corporation, 634 F.2d 1204, 1207 (9th Cir. 1980) (citing *H. Ray Baker v. Associated Banking Corporation*, 592 F.2d 550, 551 (9th Cir.1979), *cert. denied*, 444 U.S. 832, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979)). As to the first inquiry, California Civil Procedure Code § 410.10 provides that "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (Deering 1991). Thus, the "statutory limitations upon jurisdiction are 'coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the United States Supreme Court.'" *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977) (citing *Republic International Corporation v. Amco Engineers, Inc.*, 516 F.2d 161, 167 (9th Cir. 1975)).

3. Due Process Concerns

A defendant must have certain "minimum contacts"

with the forum so that the Court's exercise of jurisdiction does not "offend traditional notions of fair play and substantial justice." *Data Disc, Inc.*, 557 F.2d at 1287 (citing *International Shoe Company v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)).

> The Supreme Court has bifurcated this due process determination into two inquiries, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the assertion of jurisdiction be reasonable.

Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc., 1 F.3d 848, 851(9th Cir.1993). When a defendant moves to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), the plaintiff has the burden of making "a prima facie showing of jurisdictional facts." *Data Disc*, 557 F.2d at 1285-86. The required prima facie showing must be of either general or specific jurisdiction.

a) General Jurisdiction

General jurisdiction exists where a nonresident defendant's activities in the state are "substantial" or "continuous and systematic." *Data Disc, Inc.*, 557 F.2d at 1287; *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995). It is clear that MML and Boos have no regular, continuous or systematic contacts with California. The vessel and Boos have only been to California twice in the

past two years; once for fuel and once for repairs. MML is a British corporation, none of its shareholders or board members are U.S. citizens, and the Maridome flies the British flag. MML does not maintain an office nor conduct any business in California other than occasional repair work.

Plaintiffs respond that Fed.R.Civ.P. 4(k)(2) provides the Court with general jurisdiction over MML and Boos.

> If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons...is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to jurisdiction of the courts of general jurisdiction of any state.

Fed.R.Civ.P. 4(k)(2). This rule allows a federal court to consider a defendant's nationwide contacts

> when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law...but having insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction.

Fed.R.Civ.P. 4, Advisory Comm. Notes. The defendants

point out that this

> narrow extension of federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country.

Id.

> Rule 4(k)(2) thus sanctions personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole to justify the imposition of United States' law but without sufficient contacts to satisfy the due process concerns of the longarm statute of any particular state.

World Tanker Carriers Corp. v. M/V Ya Mawlaya, 99 F.3d 717, 720 (5th Cir.1996); *see Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F.Supp. 1232 (D.V.I. 1997). A precondition to the application of this rule is that the defendant cannot be subject to the long-arm jurisdiction of any state. *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 (9th Cir. 1996), supplemented, 95 F.3d 1156 (9th Cir. 1996).

Plaintiffs assert federal causes of action based on the Jones Act, DOHSA and General Maritime Law. Courts have consistently held that Rule 4(k)(2) applies to admiralty actions because they "arise under federal law." *World*

Tanker, 99 F.3d at 720-23; *Western Equities*, 956 F.Supp. at 1234-36; *United Trading Company v. MN Sakura Reefer*, 1996 WL 374154 at (S.D.N.Y. July 2,1996).

Defendants argue that they do not have national contacts which are sufficiently substantial and continuous to support the exercise of personal jurisdiction pursuant to Rule 4(k)(2). Plaintiffs detail the actions of Peter Lee in the United States and contend that his contacts with the United States are systematic and continuous enough to justify exerting general jurisdiction over MML and Captain Boos. MML is the corporation that legally owns the Maridome. It hired Lee and provided him with a power of attorney empowering him to manage and operate the ship in all respects save mortgaging or selling it. The agreement gave Lee the authority:

> To manage the said yacht and to sail it to any place at his discretion....To accept on the Company's behalf service of any order, writ, summons or other legal process....To retain, employ and pay cruise staff, advocates, solicitors, accountants, brokers and other agents....To pay wages, salaries...and any other disbursements as may be contracted....To bind by his signature the Company in connection with said yacht toward any person, company or state authority...save with regard to the sale or mortgage of said yacht....To open and operate

any accounts, deposits therein and withdraw therefrom any monies....

This agreement made Lee an agent of MML, and for this reason, Lee's contacts are attributable to his principal, MML.[1] This power of attorney was revoked two days prior to the accident off the coast of Greece.

Lee's activities in the United States included hiring crewmembers, managing the finances of the Maridome, arranging for and overseeing repairs on the vessel, ordering supplies and other provisions needed for the vessel, paying the ship's expenses through an account in Texas, arranging for satellite services through a Florida corporation, maintaining a permanent address for the Maridome in Florida, purchasing and installing the Boston Whaler tender in Florida, and preparing and submitting monthly budget and accounting summaries to Molina's accountants. Although MML is a foreign corporation whose shareholders are foreign citizens, its agent conducted business in the United States. In fact, MML's agent managed the day to day operations of the corporation's largest asset, the Maridome, from an office in

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[1]Lee did not have a written contract of employment with MML. He drafted one and sent it to Molina in Mexico, but it was never signed. Molina and Lee did, however, have an oral understanding that Lee would manage the Maridome for $ 100,000 per year.

the United States.[2]

In *Western Equities v. Hanseatic*, the court faced a similar situation. A tender on one luxury yacht collided several times with another large luxury yacht off the coast of the West Indies. 956 F.Supp. at 1234. Both of the companies which owned the yachts were incorporated in the Channel Islands (U.K.) and flew the British flag. The owner of the yacht that had been damaged sued the owner of the other yacht in the District Court for the Virgin Islands. *Id.* at 1234-35. Plaintiff attempted to assert personal jurisdiction over defendant based on its national contacts under Rule 4(k)(2). Defendant's contacts consisted of (1) several visits to U.S. ports by the vessel, (2) an attempt by defendant to sell the vessel through a U.S. broker, (3) advertising for charter business in U.S. periodicals, and (4) soliciting U.S. yacht brokers for charter business. *Id.* at 1235-37. The court concluded that these contacts were not sufficiently substantial or continuous to support the exercise of personal jurisdiction over defendant. *Id.* 1239. The court noted that a defendant needs to transact business in the United States, not merely have sporadic contacts with the U.S., in order for U.S. courts to have personal jurisdiction over defendant. *Id.* at 1237-38. In determining whether a defendant has transacted business in

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[2]MML terminated Lee's agency, and all management activities within the United States ceased two days prior to the accident.

the U.S., "a court must determine whether the defendant has engaged in purposeful activity in the United States, thus invoking the benefits and protection of United States' law." *Id.* at 1237.

Similarly, in *United Trading Company*, the court held that one visit to a port in Philadelphia and maintenance of a bank account in the United States were insufficient national contacts to support personal jurisdiction under Rule 4(k)(2) over the company that owned the vessel. 1996 WL 374154. The Court noted that defendant must transact business in the United States such that it has engaged in purposeful activity within the United States. *Id.*

In *Pacific Employers Insurance Co. v. M/T Iver Champion*, 1995 WL 295293 (E.D.La. May 11, 1995), a load of fish oil was damaged during shipment and suit was filed against the insurer of the vessel. The insurer moved to dismiss for lack of personal jurisdiction. Applying Rule 4(k)(2), the court concluded that it had jurisdiction over defendant insurance company based on the following contacts: (1) a number of insureds resided in the U.S., (2) it maintained an agent for service of process in New York, (3) it hired a firm in New York to assist it with defending personal injury and cargo claims, repatriating seamen, and providing medical attention to injured crewmen, (4) it maintained two bank accounts in the U.S. from which it disbursed funds to its agents in the U.S., and (5) representatives of defendant visited the U.S. on a regular basis

to meet with insureds and insurance brokers. *Id.* These activities constitute "transacting business in the United States."

In the instant case, MML's agent managed the vessel within the U.S., purchasing supplies and services for the vessel, arranging for and overseeing repairs, performing budgeting and accounting work, hiring crewmembers, and various other activities. This constitutes the transaction of business in the United States. MML has purposefully availed itself of goods and services sold by U.S. companies, services offered by U. S. banks, and the services of a U. S. citizen as manager of its vessel. In fact, Lee incorporated a business entitled Marine Management, Inc. to transact business in the U.S. in order to effectively manage the Maridome. It was at Molina's request that Lee formed this corporation. This clearly invokes the protections and benefits of U.S. laws.

These contacts are sufficiently substantial and continuous to support the exercise of personal jurisdiction over MML under Rule 4(k)(2), however, MML's transaction of business in Virginia would have subjected it to Virginia's long-arm jurisdiction. Lee was an agent of MML and was authorized to receive service of process on behalf of MML. Thus, the company would have been subject to suit in Virginia by serving Lee.[3] Moreover, Lee's management

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[3]This power of attorney was revoked several days prior to the accident that gives rise to this lawsuit, so Lee could not have been served in Virginia with a summons and complaint in this

activities in Virginia were sufficiently substantial and continuous to subject MML to personal jurisdiction in Virginia. If MML is subject to Virginia's long-arm statute, the Court cannot use Rule 4(k)(2) to exert jurisdiction over MML based on its national contacts. *See AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d at 590. For this reason, Rule 4(k)(2) does not apply and the Court must examine MML's contacts with California. These contacts are not sufficiently substantial or continuous so as to support the Court's exercising general jurisdiction over MML.

b) Specific Jurisdiction

The Ninth Circuit has articulated a three-prong analysis to determine whether a court may exercise specific jurisdiction:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related

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lawsuit.

activities.

(3) Exercise of jurisdiction must be reasonable.

Data Disc, Inc., 557 F.2d at 1287. In short, whether specific jurisdiction exists "turns on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action." *Id.*

The Court lacks specific jurisdiction over MML because its only two contacts with California are unrelated to the accident which took place off the coast of Greece. For this reason, MML's motion to dismiss for lack of personal jurisdiction is GRANTED.

There is specific jurisdiction over Captain Boos because he was personally served with a copy of the summons and complaint in this case while in the Southern District of California. "If a person is served within the territory of the sovereign represented by the issuing court, there is no question that maintenance of the suit against him will not offend traditional notions of fairness." *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). For this reason, Boos's motion to dismiss for lack of personal jurisdiction is DENIED.

B. Subject Matter Jurisdiction[4]

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[4]Defendants entitle this a motion to dismiss for lack of subject matter jurisdiction and to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). The

A district court lacks subject matter jurisdiction over a Jones Act suit when the shipowner does not have substantial contacts with the United States so as to be subject to statutory liability in a United States court. *Rodriguez v. Flora Mercante Grancolombiana, S.A.*, 703 F.2d 1069, 1072 (9th Cir.), *cert. denied*, 464 U.S. 820, 104 S.Ct. 84, 78 L.Ed.2d 94 (1983). "Upon a proper showing, a district court may dismiss a complaint for lack of subject matter jurisdiction if the shipowner is not an 'employer' for Jones Act purposes." *Id.* (citing *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 308-09, 90 S.Ct. 1731, 1733-34, 26 L.Ed.2d 252 (1970)). When the shipowner brings a motion to dismiss for lack of subject matter jurisdiction, "the plaintiff must show that the shipowner has substantial contacts with the United States so as to be considered an employer subject to statutory liability in an American court." *Id.*

The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), listed eight factors which must be considered in deciding whether a shipowner has sufficient contacts with the United States to be an employer within the meaning of the Jones Act: (1) place of the wrongful act, (2) law of the vessel's flag, (3) allegiance or

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Court finds that this motion is properly a motion to dismiss for lack of subject matter jurisdiction. *See Rodriguez v. Flota Mercante Grancolombiana S.A.*, 703 F.2d 1069, 1072 (9th Cir.), *cert. denied*, 464 U.S. 820, 104 S.Ct. 84, 78 L.Ed.2d 94 (1983).

domicile of injured party, (4) allegiance of shipowner, (5) place of the contract, (6) inaccessibility of foreign forum, (7) law of the forum, and (8) base of operations of the shipowner. *Id*; *see Hellenic Lines v. Rhoditis*, 398 U.S. 306, 308, 90 S.Ct. 1731, 1733-34, 26 L.Ed.2d 252 (1970).[5]

In this case, all but one of the factors weigh in favor of applying law other than U.S. law. First, the accident took place in Greek territorial waters. Second, the vessel is of British registry and flies the British flag. Third, the injured parties are all British or Greek/German citizens. Fourth, the shipowner is a British corporation which is owned by a Mexican citizen and resident. Fifth, the contracts of employment of the injured seamen were entered into in Barbados, Gibraltar, and St. Martin. Sixth, suits have already been filed in Greece, so it is not an inconvenient forum. Further, all of the plaintiffs are from European countries, so the U.S. forum would not appear to be the most convenient. Seventh, the law of the forum is U.S. law. Finally, the shipowner's base of operations is either the United States where Lee managed the vessel, on board the vessel with Captain Boos, or Mexico where Molina and Falb reside. Even if the ship were managed in the U.S., this alone is

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[5]Although this analysis determines whether the Court has subject matter jurisdiction over this lawsuit, it is really a choice of law issue. Plaintiffs want United States law, specifically the Jones Act, DOHSA and General Maritime Law, to apply, and defendants want Greek or British law to apply.

insufficient to require the application of U.S. law. The vessel travels the world, only occasionally stopping in the United States.

Plaintiffs point out that in *Rhoditis*, the Jones Act was applied to a suit brought by a Greek seamen who was injured on a Greek flag ship and whose employment contract provided for the application of Greek law in a Greek forum. *Rhoditis*, 398 U.S. at 307-08, 90 S.Ct. at 1733-34. Plaintiffs fail to point out, however, that the injury took place in U.S. waters off New Orleans, the company that owned the ship had its base of operations in New York, its largest shareholder was a legal permanent resident residing in Connecticut, and that this ship "and many of its sister ships were earning income from cargo originating or terminating here." *Id.* at 307-310, 90 S.Ct. at 1733-35. The only arguable contacts the Maridome or MML have with the U.S. is that the ship was managed from Virginia, and that Captain Boos is a U.S. citizen. These fact do not mean that U.S. law should apply to an accident in Greek territorial waters, involving Greek and British sailors and a British flagged ship. Even if the Court looks past MML's ownership of the Maridome to Enrique Molina, he is a Mexican citizen who lives in Mexico City. Lee stated that every time he met Molina it was either in Mexico City or on the yacht.

Plaintiffs argue that the location of MML's base of operations is the dispositive factor in the *Lauritzen/Rhoditis* analysis. While it is true that this is one of the most important

factors to consider, it alone is not dispositive, especially when all other factors weigh against the application of United States law. The Ninth Circuit has consistently weighed all eight of these factors, according the most weight to the law of the flag, the shipowner's base of operations, and the citizenship of the injured seamen.[6] The Ninth Circuit has recognized that the

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[6]Plaintiffs are correct that courts in the Second and Fifth Circuits have given greater weight to the shipowner's base of operations. In *Aritypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2nd Cir.1976), *cert. denied*, *Compania Maritima San Basilio v. Antypas*, 429 U.S. 1098, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977), a Greek seaman was injured on the high seas on a Greek flagged vessel owned by a Panamanian corporation. The Second Circuit found the Jones Act applicable because the stockholders in the Panamanian corporation were U.S. citizens, the shipping line was operated by a firm in New York, all money was received by an agent in New York, and all expenses were paid by the agent in New York. *Id.* at 308- 10. "These contacts are substantial and predominate over such factors as the ship's flag, the place of incorporation of the shipowner, and the seaman's nationality." *Id.* at 310. This is significantly more contact with the United States than exists in the instant case.

In *Gonzalez v. Naviera Neptuno*, 832 F.2d 876, 880 (5th Cir. 1987), the court noted that "[s]ince determination of the important question of whether American law does or does not apply turns substantially on *Lauritzen-Rhoditis*, the base of operations of the defendant may sometimes be decisive." The court then reversed the district court's conclusion that the base of operations was in the United States because the fact that the company's vessels called often on U.S. ports and carried goods back and forth to the U.S. did not make the U.S. the company's base of operations. *Id.* at 880-81.

Plaintiffs reliance on *Karvelis v. Constellation Lines S.A.*,

application of these factors is an attempt to gauge each country's interest in having its own law apply. The application of these factors should not be done mechanically, but should reflect an understanding of which country or

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806 F.2d 49 (2nd Cir. 1986), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987), is inapposite because it was a suit against the operator of the vessel rather than the owner. The Second Circuit held the operator liable as the employer when it had chartered the ship and hired plaintiff to crew it. The operator was a U.S. company. The issue in that case was whether all operator could be liable as an employer, not whether there was sufficient connection with the United States to warrant application of the Jones Act. *Id.* at 50-52.

The Ninth Circuit has consistently weighed all eight of the *Lauritzen/Rhoditis* factors in all attempt to determine which country has the strongest interest in having its law apply to the dispute, giving the greatest weight to the law of the flag, the shipowner's base of operations, and the citizenship of the seaman. *See Phillips*, 632 F.2d at 86-87; *Pereira*, 764 F.2d at 688-89; *Rodriguez*, 703 F.2d at 1072-73; *Dalla*, 771 F.2d at 1277-79; *Bilyk*, 754 F.2d at 1541. Moreover, the Fifth and Second Circuit cases are distinguishable because they involved commercial shipping operations which transported either goods and/or people to and from the United States. In those cases, the defendant was deriving profits from its operations in the United States. One of the courts' concerns was that foreign corporations doing business in the U.S. and competing with U.S. corporations not be at a competitive advantage because injuries to their crewmen are subject to foreign damages laws which are less generous than U.S. damages law. In the instant case, the vessel is a private luxury yacht that does not derive any profit from its operations in the United States, nor does it compete with any U.S. companies.

countries have the strongest interest in having their law apply. *See Rhoditis*, 398 U.S. at 308-09, 90 S.Ct. at 1733-34.

In *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 688-89 (9th Cir. 1985), a Spanish seaman on a Liberian vessel whose base of operations was in the United States was injured in the waters off Thailand. The Ninth Circuit found the most important factors to be the law of the flag and the allegiance of the injured seaman. The Court discounted the importance of the shipowner's base of operations.

> Pereira's "base of operations" argument confronts two significant factors supporting the district court's conclusion that Liberian law applies. First, the law of the flag is the "most venerable and universal rule of maritime law." The [ship] flies the Liberian flag. Second, the contract provided that the law of the flag governs all disputes. These considerations outweigh the fact that [the shipowner] is based in San Francisco, especially in light of the fact that the [ship] rarely called on an American port.

Id. at 689-90. The Ninth Circuit affirmed the district court's conclusion that Liberian law applied to the dispute and its dismissal of the suit for forum non conveniens. *Id.*

Similarly, in *Villar v. Crowley Maritime Corporation*, 782 F.2d 1478, 1481- 82 (9th Cir.1986), a Philippine seaman on a Philippine-flagged ship owned by a United States

corporation with its base of operations in the United States was injured in Saudi Arabian waters. The court gave the most weight to the law of the flag and the allegiance of the injured seaman, both of which pointed to the application of Philippine law. *Id.* The Court discounted the importance of the shipowner's base of operations. "The district court did not make a specific factual finding on this point, but even assuming that GTO Corporation's base of operations is in the United States, under these facts that alone is not a sufficient basis to apply the Jones Act." *Id.* at 1482.

In *Rodriguez v. Flota Mercante Grancolomblana, S.A.*, 703 F.2d 1069 (9th Cir.), *cert. denied*, 464 U.S. 820, 104 S.Ct. 84, 78 L.Ed.2d 94 (1983), the court held that United States law should not apply even though: (1) the company earned almost $100,000,000 in income from ships which called on U.S. ports; (2) virtually all of the voyages of the ship on which plaintiff worked had contact with U.S. ports; (3) the shipowner had three representatives in the United States; (4) shipowner had an operating manager in the United States; (5) thirteen of the shipowner's vessels regularly call on U.S. ports; (6) the shipowner's letterhead listed a San Francisco address; (7) the shipowner maintained an office and phone number in San Francisco; (8) the shipowner advertised in U.S. publications; and (9) the sailor was injured while the ship was in the port of San Francisco. *Id.* at 1072-73. Despite all of these connections to the United States, the Ninth Circuit affirmed the dismissal of the Jones Act claim

because: (1) the sailor was a Columbian; (2) the ship flew the Columbia flag; and (3) the shipowner's overall base of operations was Columbia. *Id.* Since a Columbian seaman was injured on a Columbian ship, Columbia had the strongest interest in having its law apply.

In *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir.1980), *cert. denied, Romilly v. Amoco*, 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981), a U.S. flagged vessel owned by a U.S. company was performing drilling operations off the coast of Trinidad. Several Trinidad citizens were injured in an accident there. The vessel was drilling under a license to a U.S. corporation whose principal place of business was in Trinidad. The drilling operation had received a permit and was being monitored by the Trinidad government. *Id.* at 83-84. The Court proceeded to apply the *Lauritzen/Rhoditis* factors and to balance the interests of the United States and Trinidad in adjudicating the lawsuit. The Court noted that the law of the flag, the allegiance of the shipowner and the law of the forum pointed towards the application of U.S. law. *Id.* at 86. Although the law of the flag is usually given great weight because there must be a consistent law of the ship, it was discounted in this case because the drilling rig was stationary off the coast of Trinidad for six years. *Id.* The Court placed much more weight on the place of the wrongful injury, the base of operations of the drilling company, and the citizenship of the injured seamen. These all pointed towards Trinidad. *Id.* at

86-87.

In *Dalla v. Atlas Maritime Co.*, 771 F.2d 1277 (9th Cir.1985), a Syrian seaman was injured in U.S. territorial waters while on a vessel of Greek registry owned by a Liberian corporation. *Id.* at 1277-78. Although the shipowner was a Liberian corporation, its shareholders were U.S. citizens and its base of operations was the United States. These two factors along with the place of injury were sufficient to justify the application of U.S. law to plaintiffs suit. *Id.* at 1278-79.

Finally, in *Bilyk v. Vessel Nair*, 754 F.2d 1541 (9th Cir. 1985), the Ninth Circuit affirmed the dismissal of a Jones Act complaint by a U.S. citizen when the vessel flew the Mexican flag, its owners and shareholders were Mexican citizens, Mexico was not an unduly onerous forum, and the written employment contract was entered into in Mexico. Plaintiff was a U.S. citizen living in El Cajon, California who was hired on as a helicopter pilot to fly off the vessel in search of fish. He was injured when he crashed the helicopter into the ocean in international waters. The Court held that the fact that the injured seaman was a U.S. citizen, that the vessel docked in San Diego occasionally for fuel and repairs, and that the vessel owners maintained a bank account in San Diego were insufficient to justify the application of U.S. law. *Id.*

As the *Phillips* court explained, the *Lauritzen/Rhoditis* factors are really an attempt by courts to balance the interests

of different countries in having their law apply. *Phillips*, 632 F.2d at 84-86. For instance, when the injury takes place in a country's coastal waters and injures its citizens, that country has a strong interest is providing redress for those injuries. *See Phillips*, 632 F.2d at 82-84; *Villar*, 782 F.2d at 1481. Similarly, many U.S. courts have held that the U.S. has a strong interest in having its law apply when the shipowners are U.S. citizens and have their base of operations in the U.S. *See Dalla*, 771 F.2d 1277; *Antypas*, 541 F.2d 307. Countries have an interest in having their law apply either when their citizens are injured or when their citizens or companies cause injuries to other people. This is based on a country's interests in protecting its citizens and regulating the conduct of its citizens so that they do not injure others.

In this case, however, the U.S. has very little interest in having its law apply because neither the injured people nor the owners of the vessel are U.S. citizens. The accident took place in Greek waters, killing two Greek/German citizens and two British citizens. This provides Greece with a strong interest in having its law apply. The owner of the Maridome is a U.K. corporation and three of the injured seamen are British. This gives the U.K. a strong interest in having its law apply. "[T]here is no doubt that 'when the links to the United States are weak and the interests of another sovereign are substantial, the Jones Act is not applicable.'" *Phillips*, 632 F.2d at 86.

All of the cases cited by plaintiffs involve injured

seamen. When a seaman hires onto a vessel, his nationality takes on lesser importance because he knows that he will be traveling around the world. This is one of the reasons why the flag of the vessel and the vessel owner's base of operations take on so much importance in choice of law. In this case, three of the dead or injured people were crewmembers of the Maridome, but two were not. Greece has a much stronger interest in having its law apply to its own nonseamen citizens who were killed by a foreign ship while in her waters. These people merely hitched a ride across the harbor on the tender. Further, since the accident took place in Greek waters, many of the witnesses are in Greece, an investigation took place in Greece, and half of the plaintiffs in this case reside in Greece. It would be much more efficient for this suit to proceed in Greece.

Moreover, it is not even clear that the Maridome's base of operations was in the United States. MML terminated Lee and revoked his power of attorney two days prior to the accident off the coast of Greece. Once Lee was terminated, his duties were taken over, in part, by Captain Boos on board the vessel, and in part, by Falb in Mexico City. Thus, at the time of the accident, none of the Maridome's operations were being managed out of the United States. Since the date of the accident, the management of the Maridome has taken place exclusively on board the vessel or in Mexico City.

The proper time for applying the *Lauritzen/Rhoditis* factors is the moment when the accident occurs. The question

is whether the shipowner was an employer within the meaning of the Jones Act when the accident occurred. In this case, at the moment the accident occurred, the ship's base of operations was either on board the ship or in Mexico. Thus, none of the *Lauritzen/ Rhoditis* factors weigh in favor of the application of U.S. law to this dispute, and this case must be dismissed for lack of subject matter jurisdiction.

Even if the Court examines the shipowner's base of operations for the 18 months prior to the accident, the Court cannot make a finding that the Maridome's base of operations was in the United States. The Maridome's operations were managed on three levels. On board the ship, the Captain oversaw the day-to-day operations of the ship, including the crew's performance of their duties, the provisioning of the ship, maintaining proper accounting for ship's expenses, and sailing the ship from one place to another. In Virginia, Lee oversaw the operations of the Maridome on a higher level. He interviewed and hired crewmembers, arranged for mail delivery and satellite communications services, prepared and submitted monthly budgets and accounting summaries, dealt with insurance brokers, and arranged for and oversaw repairs. On the highest level, Molina, often through Falb, made the ultimate decisions about how the Maridome was to operate. He purchased the Maridome, he hired Lee and the captains that replaced him, he told Lee to purchase a new Boston Whaler tender, he dictated where the ship would sail, and he provided Lee and Boos with money for the ship's expenses.

It is difficult to choose one base of operations for the Maridome because different management activities were being performed at different locations. Plaintiffs argue that the place where day-to-day operations are managed is the base of operations. *See Phillips,* 632 F.2d at 88. If this is true, then the base of operations is onboard the ship itself Captain Boos managed the dayto-day activities of the crew, provisioning the ship, deciding how to sail where Molina directed, and maintaining daily account ledgers. Lee performed more of the month-to-month activities; overseeing repairs, setting up satellite communications, arranging for major refueling stops, submitting monthly accounting summaries, and hiring new crewmembers. Given that there are no other substantial connections to the United States, the fact that Lee performed a portion of the management of the vessel from the United States is insufficient to justify applying U.S. law.

For these reasons, the Court lacks subject matter jurisdiction over plaintiffs' Jones Act claims. *Lauritzen* was a Jones Act case; however, the Supreme court extended the *Lauritzen/Rhoditis* test to General Maritime Law claims in *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959). Although it has not been addressed by the Supreme Court or the Ninth Circuit, other circuits have applied this test to DOHSA claims as well. *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 900 (3rd Cir.1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1449, 55 L.Ed.2d 494

(1978); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 454 (2nd Cir.1975), *cert. denied,* 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976).

For these reasons, defendants' motion to dismiss for lack of subject matter jurisdiction is GRANTED. Although the Court lacks subject matter jurisdiction over causes of action brought under the Jones Act, DOHSA or General Maritime law, plaintiffs could still bring causes of action under Greek or U.K. law. For this reason, the dismissal for lack of subject matter jurisdiction would be with leave to amend. Accordingly, the Court next examines whether the entire case should be dismissed for forum non conveniens.

C. Forum Non Conveniens

1. Standard of Law

If a forum is seriously inconvenient for a party and an alternative forum exists, the court may dismiss the action. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (198 1), *reh'g denied, Piper Aircraft Co. v. Reyno,* 455 U.S. 928, 102 S.Ct. 1296, 71 L.Ed.2d 474 (1982).

> [W]hen an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish...oppressiveness and vexation to a defendant...out of proportion to plaintiffs convenience," or when the "chosen

> forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of sound discretion, dismiss the case.

Id. at 241, 102 S.Ct. at 258. Defendants have the burden to demonstrate the existence of an adequate alternative forum, and that private and public interest factors favor dismissal. The private interest factors which the Court must consider include:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There also may be questions as to the enforceability of a judgment if one is obtained.

The public interest factors which the Court must consider include:

> the administrative difficulties of a congested court system; the imposition of jury duty on the people of a community that has no relation to the litigation; the local interest in having localized controversies decided at home; and

the familiarity of the court with the applicable law.

Further, although the presence of American plaintiffs is not in itself sufficient to bar a court from dismissing the action, the defendant must satisfy "an almost impossible burden" in order to deny a citizen access to the courts of his or her country. Considerably less deference is accorded claims brought by foreign citizens. *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990). "This forum non conveniens analysis applies with equal force in the context of admiralty and maritime jurisdiction." *Id.*

2. Jurisdiction to Dismiss for Forum Non Conveniens

In admiralty cases, the Court should first make a choice of law determination before embarking on a forum non conveniens analysis. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482 (9th Cir. 1987), *cert. denied, Crowley Maritime Corp. v. Zipfel,* 486 U.S. 1054, 108 S.Ct. 2819, 100 L.Ed.2d 921 (1988). In the choice of law analysis, if the Court concludes that the Jones Act applies, then "dismissal for forum non conveniens is precluded." *Id.* at 1486-87. Since the Court has concluded that the Jones Act does not apply, it is not precluded from dismissing the case for forum non conveniens.

3. Alternative Fora for this Lawsuit

Before a complaint can be dismissed for forum non conveniens, the defendants have the burden of showing an "adequate and available alternative forum." *Piper*, 454 U.S. at 235, 102 S.Ct. at 252-55. This action had to be instituted in the Southern District of California because it is an in rem action against the vessel, and the vessel was physically seized in this district. The in rem attachment provides plaintiffs with a guarantee that any judgment rendered will be satisfied. Thus, in order for an alternative forum to exist, the in rem attachment must be transferable to that forum, or another bond must be posted in that forum. *Perusahaan Umum Listrik Negara v. M/V Tel Aviv*, 711 F.2d 1231, 1238-39 (5th Cir, 1983).

> In admiralty, a vessel ordinarily may be seized in rem on only one occasion, because the seizure releases the vessel from the maritime lien related to the claim. Therefore dismissal of an in rem action may present plaintiff with no alternative forum where jurisdiction is available. Even in those cases where plaintiff can obtain in personam jurisdiction over defendant and an alternative forum thus becomes available, the inability to attach the vessel as security for the enforcement of judgment may render the remedy offered by the alternative forum "no remedy at all" and therefore inadequate.

Id. Before the Court can dismiss plaintiffs' complaint for forum non conveniens, the Court must be assured that the alternative forum will accept transfer of the bond or that similar bond has been posted there prior to dismissal of this action.

Defendants argue that both Greece and the United Kingdom are alternative fora which are superior to the United States.

a) Greece

Two days after the accident, on September 5, 1995, several of the plaintiffs in this case filed suit in Greece. The ship was arrested and was required to post a bank guarantee of 62,000,000 drachmas.[7] Once MML posted the bank guarantee, the vessel was released. Defendants subsequently impleaded the Greek government for failure to light or otherwise mark the metal structure. The other plaintiffs in this action joined the Greek action in September of 1996. In October of 1996, plaintiffs arrested the vessel in the United States and began the instant action. The Greek state requested an adjournment of the Greek action in early November of 1996 because it had not had adequate time to prepare its defense. The Greek court denied this motion. Plaintiffs

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[7]The exchange rate is approximately 250 drachmas to one dollar, so this security is equivalent to $248,000.

subsequently withdrew their Greek action on November 5, 1996 without prejudice to their right to reassert such action in the future. Despite the withdrawal of the court action, the 62,000,000 drachma bank guarantee remains posted in favor of the plaintiffs.

Defendants argue that the availability and adequacy of the Greek forum is demonstrated by the fact that plaintiffs initiated a suit there, had a bank guarantee posted, and could have continued to litigate their suit there. Plaintiffs' counsel in the Greek action stated that Greek law provides tort remedies for plaintiffs who have suffered bodily injuries and also provides for damages to be awarded to decedents' families for wrongful death arising from tort. Plaintiffs can recover both their financial loss and moral injury. Moral injury includes damages for grief, sorrow and mental distress that family members have suffered due to the death of one of their relatives.

Defendants also argue that they intend to sue the Greek government for indemnity for failure to light or otherwise mark the metal structure. They cannot implead the Greek government in the United States due to the bar of sovereign immunity. *See Foreign Services Immunity Act*, 28 U.S.C. § 1605 et seq. (stating that foreign states are immune from the Jurisdiction of U.S. courts). As evidenced by the suit which was filed in Greece, defendants will be able to sue

the Greek government in the Greek courts.[8] Defendants contend that the Greek government is a necessary and indispensable party to this action because its negligence in falling to light or otherwise mark the metal structure was the proximate cause of the accident.

Plaintiffs respond that the Greek courts are inadequate because most of the plaintiffs cannot proceed on their products liability action against Boston Whaler under Greek law. Apparently, under Greek law, a person can only bring a products liability action if the product was being used by the person in his personal, as opposed to professional or occupational, capacity. Plaintiffs argue that because the decedents were "on duty" when the accident occurred, their relatives and estates cannot maintain a products liability action. The evidence, however, is that the crewmembers had the night off duty and were on shore visiting several bars. Thus, they were not "on duty" when the accident occurred. Plaintiffs concede that if they were not "on duty" when the accident occurred, they can maintain a products liability action against Whaler. Moreover, two of the decedents were not crewmembers and were just hitching a ride on the tender. These people were using the product solely in their personal

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[8]There is some dispute over whether a suit against the Greek government can be maintained in Greek Civil Court. Apparently, suit can be maintained against the government, but it must be brought in Greek Administrative Court.

capacities. The unavailability of strict products liability does not make the Greek courts an inadequate forum. In *Piper*, the Supreme Court stated that "[a]lthough the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly." *Piper*, 454 U.S. at 255, 102 S.Ct. at 265. The Supreme Court went on to say that unless the other nation affords a remedy "so clearly inadequate to be no remedy at all," substantial weight cannot be given to this consideration. *Id.* at 254, 102 S.Ct. at 265. In this action, plaintiffs bring both negligence and a strict products liability causes of action against Whaler.

Even if the Court were to retain this suit, the choice of law analysis reveals that Greek or U.K. law should apply. The causes of action which may be brought are not dependent on the forum, but on the substantive law that applies. If Greek law were to apply, then plaintiffs could not maintain any cause of action in U.S. courts that they could not maintain in Greek courts. Thus, if Greek law does not allow certain plaintiffs to recover under products liability causes of action, they will be barred regardless of whether the suit proceeds in the U.S. or Greece. Moreover, if Greek law applies, this is a strong factor weighing in favor of a Greek forum. This Court has no knowledge of or experience in applying Greek law, whereas Greek courts are experts in Greek law.

Plaintiffs are also concerned about obtaining

jurisdiction over Whaler and Captain Boos in Greek court. This concern will be alleviated by conditioning the dismissal of this suit on Boos and Whaler's submitting to jurisdiction in the Greek courts.[9]

Plaintiffs' second objection to a Greek forum is that "defendants have demonstrated their lack of respect for the authority of the Greek courts and justice system." Once the 62,000,000 drachma bank guarantee had been lodged, the ship was released and sailed from Greek waters. Later, the Greek court ordered defendants to increase the bond by 60,000,000 drachmas, but defendants' Greek counsel allegedly refused to accept service of the supplemental arrest warrant because the ship was no longer in Greek waters. Plaintiffs argue that this cavalier disregard for the Greek courts is evidence that defendants will not abide by future orders of the Greek courts. This concern will be alleviated by conditioning dismissal of this action on the posting of whatever bond the Greek court deems appropriate. If the Greek court already has MML's money, it would not be possible for MML to ignore a judgment of the Greek court.

Plaintiffs' final objection to a Greek forum is that criminal proceedings for negligent homicide are pending against Captain Boos and Chief Engineer Ian MacNeil, the driver of the tender when it crashed. Both apparently fled Greece with the Maridome and have not appeared in Greek

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[9]Counsel for both Whaler and Boos stated at oral argument that their clients would agree to this condition.

court to answer the charges against them. Plaintiffs contend that in order to avoid criminal prosecution, neither of these men will return to Greece. Thus, if this civil case were to go to trial in Greece, these men would only testify via deposition. Since Boos is a party to this action, the Court could condition its dismissal on his submitting to the jurisdiction of the Greek courts in a similar civil action. In *Gazis v. John S. Latsis (USA) Inc.*, 729 F.Supp. 979, 989 (S.D.N. Y. 1990), the Court stated that Greece had a strong interest in "adjudicating the rights of Greek seamen," and noted that "Greece has already demonstrated its interest in this particular case by initiating criminal proceedings against the master, chief officer, and the boatswain of the LADY EMA."

For these reasons, Greece is an adequate alternative forum in which this suit could be prosecuted.

b) United Kingdom

Defendants also argue that the U.K., like Greece, would be an adequate alternative forum in which this suit could be prosecuted. Plaintiffs do not dispute that British law allows recovery for wrongful death and personal injuries. Rather, plaintiffs contend that U.K. courts lack jurisdiction to adjudicate claims brought by non-U.K. citizens. Two of the five decedents are not U.K. citizens, and the U.K. courts will only entertain their suits if the tortious act was committed in the U.K., if the damages from the tortious act were felt in the

U.K., or if the defendant is located in the U.K. Plaintiffs further state that MML is incorporated in the Channel Islands (Jersey) which, although part of the U.K., would not subject MML to the jurisdiction of the U.K. courts. Defendants respond that British courts would not refuse to hear suits against a vessel of British registry which flies the British flag. Further, suit could be brought in the Channel Islands where MML is incorporated.

This potential difficulty could be overcome by the Court's conditioning dismissal of this action on the acceptance of jurisdiction over the suits brought by the estates and families of the Greek decedents by the U.K. courts. If the U.K. courts were to decline jurisdiction, then this action could return to this Court.

For this reason, the courts of the United Kingdom are also an adequate alternative forum in which this suit could be prosecuted.

4. Public Interests

Public interest factors address the burden the litigation would place upon the Court and members of the public if it were to proceed in the forum chosen by plaintiffs. "Public interest factors encompass court congestion, the local interest in resolving the controversy, and the preference for having a forum apply a law with which it is familiar." *Lockman Foundation v. Evangelical Alliance Mission,* 930 F.2d 764,

771 (9th Cir. 1991).

California and the United States have no interest in resolving this dispute. The accident took place in Greek waters, no U.S. citizens were injured, none of the witnesses on board the tender are U.S. citizens, the vessel flies the British flag, its owner is a U.K. corporation whose shares are held for the benefit of a Mexican citizen, all of the decedents received medical attention in Greek hospitals, and the Greek authorities conducted an investigation into the accident. Defendant Boos is a U.S. resident, but he has not lived in the U.S. in the past twenty years.

The choice of law analysis reveals that Greek or British law would apply to this dispute. This Court has no expertise in foreign law, while Greek and British courts are experts in their own law. The preference for having a forum apply a law with which it is familiar dictates that this suit should be dismissed in favor of proceedings in either Greece or the U.K.

Moreover, Greece has a strong interest in resolving this dispute because two of its citizens were killed in its coastal waters. The United Kingdom also has a strong interest in resolving this dispute because two of its citizens were killed and one was injured, the vessel responsible for their deaths flies the British flag, and the owner of the vessel is a U.K. corporation. Countries have a strong interest in protecting their citizens and in regulating their citizens so that they do not injure others. This demonstrates that the United

States has no interest in resolving this dispute, while both the U.K. and Greece have strong interests.

Plaintiffs attempt to minimize these interests by arguing that although three of the injured or killed sailors were British, they lived aboard the vessel full-time, so the U.K. does not have a strong interest in their welfare. Similarly, the Greek decedents were dual citizens of Greece and Germany and resided much of the time in Germany, so plaintiffs contend that Greece does not have a strong interest in their welfare. These arguments are unpersuasive.

The Ninth Circuit has affirmed dismissals for forum non conveniens under similar circumstances. In *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1483 (9th Cir. 1986), a Jones Act suit by family members of a Philippine sailor who drowned in Saudi Arabian waters while working on a Philippines-flagged ship owned by Americans was dismissed for forum non conveniens. The Court stated:

> We also agree with the district court's conclusion that the Philippines has a powerful interest in deciding the controversy because of its strong contacts with both the decedent and the [vessel], and that American jurors and court personnel have little interest in this controversy. The district court concluded that the public interest factors point to a Philippine forum.

Id. Similarly, in *Sigalas v. Lido Maritime, Inc.*, 776 F.2d

1512 (11th Cir. 1985), the court ruled that the Jones Act claim by the wife of a Greek sailor on a Greek-flagged ship owned by a Liberian corporation whose principal place of business was in Greece was properly dismissed for forum non conveniens. The Court stated that plaintiff "represents the archetypal foreign plaintiff bringing her foreign claim to American courts to secure relief more generous than she would get under the law of her homeland." *Id.* at 1520.

Boston Whaler cites the Supreme Court's seminal forum non conveniens decision of *Piper Aircraft v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), in support of its motion to dismiss for forum non conveniens. In *Piper*, a plane owned by a Scottish company crashed in Scotland, killing Scottish and English citizens. The Court explained that the benefits of retaining the action in the U.S. where the manufacturer of the airplane resides were insignificant compared to the enormous burden the foreign dispute would place on the U.S. court system. *Piper*, 454 U.S. at 260-61, 102 S.Ct. at 268-69. "The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.*

Finally, in *Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 380 (S.D.N. Y. 1996), the Court stated:

> There is a final public interest consideration that bears more than passing mention. This is

> a case brought on behalf of a Greek seaman who shipped aboard a Liberian vessel crewed by a Greek company which, wherever its ownership lay, was engaged exclusively in carrying cargos to and from non-U.S. ports. There are fora and remedies available to plaintiffs under the laws of their country of domicile....There seems little justification for opening the courts of the United States--which are paid for by U.S. taxpayers and whose juries are composed of U.S. citizens asked to drop their everyday activities to serve--to claims in these circumstances, even if, as plaintiffs stoutly argue, the ultimate base of operations of the vessel in question was the United States.

Id. (emphasis added).

Given the strong interest that Greece and the U.K. have in resolving this dispute and the minimal U.S. interest, the public interest weighs strongly in favor of granting defendants' motion to dismiss for forum non conveniens.

5. Private Interests

The private interests center on the convenience of the parties and witnesses. The factors to consider include: (1) accessibility of proof; (2) availability of compulsory process

for the attendance of unwilling witnesses, and the cost of transporting friendly witnesses; (3) the possibility of viewing the premises; and (4) other practical problems that may make a case, easy, expeditious, and expensive. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947).

First, the proof is more accessible in Greece. The accident took place in Greek coastal waters, the Greek authorities conducted an investigation there, the injured people were treated in Greek hospitals, and many of the plaintiffs reside in Greece. Moreover, the heart of plaintiffs' case is that MacNeil was drinking heavily at a bar in Pireaus, Greece, that he was driving the tender at an excessive speed, and that the tender was overloaded. All of the percipient witnesses to these events are either in Greece, or on board the Maridome. Thus, many of the witnesses and much of the documentary evidence will be found in Greece.

Plaintiffs respond by arguing that they do not need to call many witnesses who are not current crewmembers of the Maridome. Plaintiffs plan to call Peter Lee, a resident of Virginia, who is in poor health, and might not be willing or able to travel to Greece for the trial. Plaintiffs also state that they can retain a doctor in the U.S. to testify to damages. The one surviving sailor's treating doctor resides in England and is willing to fly to the U.S. to testify. Finally, plaintiffs argue that they intend to call Whaler employees to testify regarding their products liability claims. These witnesses would all be

U.S. residents.

While plaintiffs may not intend to call Greek witnesses, it does not mean that defendants will not need to call many Greek witnesses. Moreover, defendants intend to seek indemnity from the Greek government, and this is only available in Greece. Since the Court is conditioning dismissal on Whaler's submission to Greek jurisdiction, it could be required to produce its employees to testify at trial in Greece, or at least to produce them to testify by deposition.

The next factor to consider is the possibility of viewing the premises. The premises are located in Port of Poros, Greece. Plaintiffs point out that the metal structure has since been removed by the Greek government, so there would not be much to view at the site. Photographs were taken of the structure and they could be introduced at trial no matter where trial is held.

There are several other practical considerations to take into account. First, plaintiffs are worried about the enforceability of a Greek judgment. Plaintiffs point out that MML refused to post the additional security required by the Greek court and that MacNeil and Boos have not submitted to criminal prosecution there. Since the Court is conditioning dismissal of this suit on MML's posting whatever security the Greek court requires, this money could then be used to satisfy any judgment. Plaintiffs are upset because the amount of bond that will be required by Greek courts will probably not be as large as the $15,000,000 bond that this Court required.

See Sigalas, 776 F.2d 1512 (noting that the fact that relief under U.S. law would be more generous does not make the foreign forum inadequate).

Second, plaintiffs are concerned about the potential language barrier in the Greek courts. With the exception of the families of the Greek decedents, none of the other plaintiffs or defendants speak Greek. Plaintiffs contend that obtaining translators will increase the length and cost of the Greek trial. In *Neo Sack, Ltd. v. Vininar Impex, Inc.*, 810 F.Supp. 829, 836 (S.D.Tex. 1993), the court noted the fact that many of the underlying documents were in Gujrati, Hindi or other Indian languages as one of the reasons for dismissing the case for forum non conveniens. In this case, we already have English translations of some affidavits of Greek witnesses. It is apparent that no matter where the case is tried, there are both English speaking and Greek speaking witnesses. All of the crewmembers of the Maridome speak English, but the documents regarding the Greek authorities' investigation of the incident and the medical treatment of the injured sailors in Greek hospitals would be in Greek. If the case were to proceed in Greece, plaintiffs would retain Greek counsel to speak on their behalf.

Third, plaintiffs argue that since a portion of this action is an in rem action against the ship, it can only be brought where the ship is found. Plaintiffs cite *Cliffs-Neddrill Turnkey International-Oranjestad v. M/ T Rich Duke*, in which the court stated "[b]ecause an in rem action may only

be brought in one district, that district, in most cases, should be deemed convenient." 734 F.Supp. 142, 145-46 (D.Del.1990). This is true in most cases because the asset seized is usually real property or some other immobile object. It is most convenient to bring the suit in the district where the property is located because it cannot be moved. Ships, by their very nature, are extremely mobile. There are multiple districts where an in rem action could be brought against the ship, depending on the current location of the vessel. In this case, in fact, the vessel was previously arrested in Greece and a bankguarantee was lodged before the ship was released. This demonstrates that a similar action can be brought in Greece and negates any perceived efficiency or convenience from having the in rem suit proceed in the United States.

Finally, defendants argue that the fact that they would be barred from impleading the Greek government for indemnity in the U.S. is a factor that weighs in favor of dismissing this case for forum non conveniens. Although defendants would have to bring a separate action in the Administrative Courts of Greece, those courts give deference to findings in the Greek Civil courts. For this reason, if the Greek civil courts were to reach a final judgment in this action and found that the Greek government had been negligent, defendants could proceed against the government in the Administrative Courts for indemnity. The findings of the Civil Court would be entitled to deference in the Administrative Court. There is no assurance that such a

finding by a United States District Court would be accorded any deference by the Greek Administrative Court.

Both Greece and the U.K. are adequate alternative fora, and the balance of private and public interests weighs strongly in favor of dismissing this action for forum non conveniens. For these reasons, the Court GRANTS defendants' motion to dismiss for forum non conveniens.

IV. Conclusion

The Court has in rem jurisdiction over the Maridome by virtue of the Supplemental Rule B attachment of the vessel. Also due to this attachment, the Court has quasi in rem jurisdiction over MML to the extent of the value of the vessel. The Court has personal jurisdiction over defendant Boos because he was personally served while in the district. Although MML has sufficient contacts with the United States to support the exercise of personal jurisdiction over it, the Court lacks personal jurisdiction over it because its contacts with Virginia are sufficient to subject it to personal jurisdiction in Virginia. *See* Fed.R.Civ.P. 4(k)(2). For these reasons, defendant Boos' motion to dismiss for lack of personal jurisdiction is DENIED, and defendant MML's motion to dismiss for lack of personal jurisdiction is GRANTED.

The second issue is whether the Court has subject matter jurisdiction over plaintiffs' claims under the Jones Act,

DOHSA and the General Maritime Law. Based on the application of the *Lauritzen/Rhoditis* factors, the Court concludes that United States law should not apply; rather, Greek or U.K. law should apply. Defendants' motion to dismiss for lack of subject matter jurisdiction is GRANTED with leave to amend.

Since application of the *Lauritzen/Rhoditis* factors determines whether the Court has subject matter jurisdiction over plaintiffs' claims, not whether a claim can be stated upon which relief can be granted, defendants' motion to dismiss pursuant to Rule 12(b)(6) is DENIED. This motion is also moot since the Court is granting defendants' motion to dismiss for lack of subject matter jurisdiction.

Finally, the Court GRANTS defendants' motion to dismiss for forum non conveniens. Both Greece and the United Kingdom are adequate alternative fora, and the private and public interest factors weigh strongly in favor of dismissing this action in favor of an action in one of those fora. This dismissal is conditioned on: (1) all of the defendants making a general appearance in the foreign forum chosen by plaintiffs; (2) MML whatever security for the vessel the foreign court requires, and (3) the foreign court's acceptance of jurisdiction over this case. Once these conditions are all met, the $15,000,000 bond held by this Court will be released, and this action will be dismissed. IT IS SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL JOHN WARN, as personal representative of The Estate of Nicholas Warn, decedent; GLORIA WARN-WYETH; LEE WARN; MELANIE WARN; NATHAN WARN; PANAGIOTIS STATHOPOULOS, as personal representative of The Estate of George Florian Stathopoulos; ROBERT STATHOPOULOS; VERA MARIA BRIGMAN; ILONA BRIGMAN-THIEL, aspersonal representative of The Estate of Andreas Brigman; CHRISTINE WILLSHAW, as personal representative of The Estate of Simon Paul Willshaw; FREDERICK WILLSHAW; RICHARD BROOKS, an individual on behalf of himself, Plaintiffs-Appellants,	Nos.97-55610 97-56355 D.C. No. CV-96-01800 -RMB ORDER AND AMENDED OPINION

v.

M/Y MARIDOME, her Engines, Tackle, Apparel, Furniture and Appurtenances, in rem; MARIDOME MARINE LIMITED, a corporation, in personam; JAMES BOOS, in personam; BOSTON WHALER, INC., a corporation, in personam,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted
December 11, 1998--Pasadena, California

Filed March 3, 1999
Amended May 3, 1999

Before: Alex Kozinski and Diarmuid F. O'Scannlain, Circuit Judges, and Frank C. Damrell, Jr.,* District Judge.

Opinion by Judge O'Scannlain

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*The Honorable Frank C. Damrell, Jr., United States District Judge for the Eastern District of California, sitting by designation.

SUMMARY

COUNSEL

Matthew F. Quint, Wilson & Quint, San Francisco, California, for the plaintiffs-appellants.

George J. Koelzer (argued), Robert J. Zapf, Joshua S. Force, Hancock Rothert & Bunshoft, Los Angeles, California; Rosemary Springer (argued), Justs N. Karlsons, S. Mark Varney, Carroll, Burdick & McDonough, San Francisco, California, for the defendants-appellees.

ORDER

The Opinion filed on March 3, 1999, is amended as follows:

1. Slip Opinion at 1797, first full paragraph, last sentence, change "August 1996" to "August 1995".

2. Slip Opinion at 1796, counsel listing, second paragraph, replace with:

George J. Koelzer (argued), Robert J. Zapf, Joshua S. Force, Hancock Rothert & Bunshoft, Los Angeles, California; Rosemary Springer (argued), Justs N. Karlsons, S. Mark Varney, Carroll, Burdick & McDonough, San Francisco, California, for the defendants-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the victims of a maritime accident in foreign waters may state claims under the Jones Act.

I.

In the early hours of September 3, 1995, the tender of the yacht M/Y Maridome ("Maridome") struck a metal pipe structure in the harbor of the Port of Poros, Greece, while ferrying passengers and crew from ship to shore. Nicholas Warn, George Stathopoulos, Andreas Brigman, and Simon Willshaw were killed in the accident; Richard Brooks was seriously injured. Warn, Willshaw, and Brooks were British crewmembers of the Maridome; Brigman and Stathopoulos were guests with Greek and German dual citizenship. The tender was apparently en route to a disco, and its helmsman allegedly was drunk and sailing at excessive speed.

The Maridome is a 177-foot luxury yacht that flies the British flag and is owned by Maridome Marine Limited, a British Channel Islands corporation. The yacht's ultimate beneficial owner is Enrique Molina, a citizen and domiciliary of Mexico. Peter Lee, a United States citizen and captain of the Maridome from August 1992 until April 1994, provided shoreside management of the Maridome from his Virginia home until August 1995, just days before the accident.

Relatives of those killed in the accident initially

sought redress in the Greek courts, filing an application for the arrest of the Maridome in the Greek Court of Piraeus on September 5, 1995, and bringing claims under Greek law. Following its arrest, the Maridome posted roughly $400,000 in security and sailed from Greece on September 18, 1995. Subsequent proceedings in the Greek courts led to the withdrawal of the claims against the Maridome, without prejudice to their reassertion in the future.

During the pendency of the Greek proceedings, Michael John Warn, Gloria Warn-Wyeth, Lee Warn, Melanie Warn, Nathan Warn, Panagiotis Stathopoulos, Robert Stathopoulos, Vera Maria Brigman, Ilona Brigman-Thiel, Christine Willshaw, and Frederick Willshaw, on behalf of the decedents, and Richard Brooks (collectively, "the Warn appellants") filed this action in San Diego, California on October 17, 1996, naming the Maridome, its owner, Maridome Marine Limited, and its captain, James Boos, as defendants (collectively, "the Maridome appellees"). The Warn appellants sought the arrest of the Maridome (then in the United States), which was granted, and brought claims under the Jones Act, the Death on the High Seas Act, and general United States maritime law.

In addition, the Warn appellants sought any remedies to which they were entitled under the laws of Greece or of the United Kingdom. The Warn appellants later filed an amended complaint, which added product liability claims against Boston Whaler, Inc. as the manufacturer of the

Maridome's tender. Following its arrest, the Maridome posted a $15,000,000 bond and left United States waters shortly thereafter.

Upon motions by the Maridome appellants and Boston Whaler, the district court dismissed the Warn appellants' Jones Act, Death on the High Seas Act, and general United States maritime law claims because it concluded that the relevant factors weighed against the application of United States law. The district court dismissed for forum non conveniens any foreign law claims that the Warn appellants might have pleaded or amended their complaint to plead.

The Warn appellants timely appealed from the dismissal of their Jones Act claims, the dismissal for forum non conveniens, and the district court's denial of their motion for reconsideration.[1]

II

The Warn appellants assert that the district court erred by dismissing their Jones Act claims. We first address a point of marginal confusion in our case law. In the district court, the Maridome appellees moved for dismissal for failure to state a claim or for lack of subject matter jurisdiction,

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[1]Panagiotis Stathopoulos, Robert Stathopoulos, Vera Maria Brigman, and Ilona Brigman-Thiel subsequently moved to withdraw from the appeal. We granted their motion; only the remaining Warn appellants are involved in this appeal.

asserting that the Jones Act was inapplicable to the Warn appellants' claims under the choice of law factors set forth by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). The district court applied the *Lauritzen* factors and granted the motion, characterizing the dismissal as one for lack of "subject matter jurisdiction," relying upon our opinion in *Rodriguez v. Flota Mercante Grancolombiana, S.A.*, 703 F.2d 1069 (9th Cir. 1983).

In Rodriguez, the majority implied that the choice of law inquiry using the *Lauritzen* factors determines whether a federal court possesses subject matter jurisdiction over a Jones Act claim. *See id.* at 1072. However, then Judge Kennedy, concurring in the result but not in the analysis, pointed out that the majority had been led astray by the Supreme Court's "passing and unguarded remark," *id.* at 1076, in *Hellenic Lines, Ltd. v. Rhoditis*, that of the seven *Lauritzen* factors, "it is urged that four are in favor of the shipowner and against jurisdiction," 398 U.S. 306, 308 (1970) (emphasis added).

Then Judge Kennedy asserted that "[t]he real question in these cases is not one of subject matter jurisdiction but simply whether or not there has been a failure to state a claim for relief under the Jones Act." *Rodriguez*, 703 F.2d at 1076.

Lauritzen itself expressly bears this assertion out. There, the Supreme Court noted that, "[a]s frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction

of subject matter." 345 U.S. at 575 (emphasis added). The Court rejected the mischaracterization of the question as one of subject matter jurisdiction, and made plain that "[a] cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." *Id.* (emphasis added).

In cases subsequent to *Rodriguez*, we have followed the *Lauritzen* "failure to state a claim" approach of the concurrence in *Rodriguez*, rather than the "subject matter jurisdiction" characterization of the *Rodriguez* majority. For example, in *Bilyk v. Vessel Nair*, we framed the issue decided by the *Lauritzen* factors as "[w]hether United States or Mexican law applies to this case, i.e., whether a cause of action was stated under the Jones Act." 754 F.2d 1541, 1542 (9th Cir. 1985). Similarly, in *Dalla v. Atlas Maritime Co.*, we indicated that the application of the *Lauritzen* factors determines "[w]hether a claim has been stated under the Jones Act." 771 F.2d 1277, 1278 (9th Cir. 1985).

Consistent with these cases, we now clarify that where a court's choice of law analysis using the Lauritzen factors indicates that foreign law, rather than the Jones Act, is applicable to a party's claims, the court's order will be treated, on appeal, as a dismissal for failure to state a claim, rather than a dismissal for lack of subject matter jurisdiction.

III

[1] Turning to the merits of the district court's dismissal of the Jones Act claims based on the Lauritzen choice of law analysis, the Lauritzen factors are (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured party, (4) the allegiance of the shipowner, (5) the place of the seaman's employment contract, (6) the accessibility of a foreign forum, and (7) the law of the forum. *See Lauritzen*, 345 U.S. at 583-592. In *Rhoditis* , the Supreme Court stated that "the list of seven factors in *Lauritzen* was not intended as exhaustive," and instructed courts to consider the "shipowner's base of operations" as an additional factor. *Rhoditis*, 398 U.S. at 309. The question to be answered by reference to these factors is a simple one: are the United States's interests sufficiently implicated to warrant the application of United States law? *See Bilyk*, 754 F.2d at 1543 ("The purpose of the analysis is to balance the interests of the nations whose law might apply.").

[2] Here, all of the relevant *Lauritzen* factors point toward the application of foreign maritime law, rather than the Jones Act: the accident occurred in Greek coastal waters; the Maridome flies a British flag; none of the injured or deceased parties are or were American citizens or domiciliaries; the shipowner is a Mexican citizen and domiciliary; none of the injured or deceased sailors's employment contracts were signed in the United States; and Greece provides an accessible forum, as evidenced by the

action filed in that forum.[2]

[3] The Warn appellants concede as much, but argue that the Maridome's United States base of operations alone provides a sufficient basis to apply the Jones Act. We have never held, however, that the base of operations factor is dispositive in the *Lauritzen* choice of law inquiry, and have instead held, in a case almost directly on point, that the Jones Act may be inapplicable despite a United States base of operations. In *Villar v. Crowley Maritime Corp.*, a Philippine seaman on a Philippine-flagged ship was injured in Saudi Arabian waters. *See* 782 F.2d 1478, 1479 (9th Cir. 1986). We did not consider it dispositive that the ship was owned by a United States corporation with what was arguably a United States base of operations. Instead, we held that "even assuming that[the shipowner's] base of operations is in the United States, under these facts that alone is not a sufficient basis to apply the Jones Act." *Id.* at 1482 (emphasis added); *see also Pereira v.Utah Transport, Inc.*, 764 F.2d 686, 689-90 (9th Cir. 1985) (holding that the Jones Act was inapplicable despite a United States base of operations because the law of the flag presumptively governs and the employment contract so provided).

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[2]Lauritzen indicates that the law of the forum is largely irrelevant, *see* 345 U.S. at 591 (stating that "there would be no justification for altering the law of the controversy just because local jurisdiction of the parties is obtainable"), and our cases are in accord, *see, e.g., Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 689 (9th Cir. 1985) (same).

[4] In fact, the only factor we have considered potentially dispositive is the law of the flag, recognizing that "*Lauritzen* itself firmly mandates that the law of the flag presumptively controls, unless other factors point decidedly in a different direction." *Bilyk*, 754 F.2d at 1545; *see also Pereira*, 764 F.2d at 689 (stating that the law of the flag is of cardinal importance and "should be accorded great weight in the choice of law analysis"). Here, the law of the flag and a majority of the other factors point decidedly in the same direction: the Maridome flies a British flag, is owned by a British Channel Islands holding company and is insured in the United Kingdom, and the remaining appellants represent British sailors whose contracts of employment were apparently signed within the British Commonwealth. Thus, even assuming that the Maridome's base of operations was the United States, the weight of the *Lauritzen* factors indicates that foreign law is applicable rather than the Jones Act.[3]

We do not decide today that a United States base of operations alone cannot ever be dispositive; we simply conclude that the factors here pointing toward application of foreign law outweigh the sole factor arguably militating in favor of applying the Jones Act. Thus we affirm the district

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[3]As we noted in *Villar*, "[w]e need not decide which nation's law should ultimately be applied to the merits in this case." 782 F.2d at 1482.

court's dismissal of the Jones Act claims.[4]

IV

[5] The Warn appellants also assert that the district court erred by dismissing their remaining claims. Having dismissed the bulk of the Warn appellants's claims under the *Lauritzen* analysis, the district court proceeded to dismiss for forum non conveniens any residual foreign or domestic claims that the Warn appellants might have pleaded or sought leave to amend to plead. The Warn appellants give relatively short shrift to this portion of the appeal in their briefs, presumably because dismissal for forums non conveniens would be precluded if the Jones Act were applicable to their claims, *see Creative Technology, Ltd. v. Aztech System Pte.*,

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[4]The Warn appellants do not appear to appeal from the dismissal of their other claims under United States maritime law. However, "[t]he analysis is the same for determining the applicability of the Jones Act and of general United States maritime law." *Bilyk*, 754 F.2d at 1543; *see also DeMateos v. Texaco, Inc.*, 562 F.2d 895, 900 (3d Cir. 1977) (applying *Lauritzen* analysis to claims under Death on the High Seas Act). Thus, if we were to review the dismissal of the Warn appellants's other claims under United States maritime law (which seemingly include their negligence and strict products liability claims brought against Boston Whaler "pursuant to the Admiralty and Maritime Laws of the United States," as the Verified First Amended Complaint states), the result would be the same.

Ltd., 61 F.3d 696, 699-700 (9th Cir. 1995). Having affirmed the district court's determination that the Jones Act is not applicable, we have little trouble determining that the district court did not abuse its discretion in dismissing the remaining claims for forum nonconveniens.

[6] The district court weighed the relevant private and public interest factors, *see generally Pereira*, 764 F.2d at 690, in particular observing that both Greece and the United Kingdom provided adequate, if not superior, alternative forums for the prosecution of the Warn appellants's claims.

On appeal, the Warn appellants do not seriously challenge the district court's finding that a Greek forum would provide better access to the necessary witnesses and evidence, or its finding that either of the foreign forum's would be more adept at applying its own law. Nor do the Warn appellants challenge the district court's finding that Greece possesses a greater interest in the death of two of its citizens in its coastal waters, and the United Kingdom possesses a greater interest in the death of two British sailors and the injury of a third employed aboard a British-flagged ship, than the interest possessed by the United States in this suit brought by foreign citizens against a foreign ship owned by a foreign corporation with a foreign beneficial owner. Nor do the Warn appellants respond to the Maridome appellees's contention that Greece provides the only forum in which the Greek government and authorities can be impleaded for contributory negligence.

[7] Instead, the Warn appellants assert that the district court failed to give sufficient deference to their choice of forum as parties proceeding in rem in an admiralty action. The district court, however, responded more than adequately to the particular concerns presented by an in rem admiralty action. The district court ensured that the Maridome appellees would appear in the foreign forum chosen by the Warn appellants by conditioning the forum non conveniens dismissal upon (1) the submission of the Maridome appellees to the jurisdiction of the foreign forum of choice, (2) the acceptance of jurisdiction by that foreign forum, and (3) the posting of any required security by the Maridome. *See Perusahaan Umum Listrik Negara v. M/V Tel Aviv*, 711 F.2d 1231, 1237-39 (5th Cir.1983) (noting that the requisite adequate alternative forum permitting dismissal for forum non conveniens generally will not exist in an in rem admiralty action unless the dismissal is conditioned upon submission to foreign jurisdiction and the posting of security).

[8] Simply put, we agree with the district court's conclusion that the courts of either Greece or the United Kingdom provide more appropriate forums for the prosecution of the Warn appellants's claims under the laws of those two nations.

V

Finally, "because we agree with the district court's

conclusion that foreign law and not the Jones Act should apply, and conclude that the district court did not abuse its discretion in dismissing the [Warn appellants's] claim[s] for forum non conveniens, we cannot say that the court's denial of reconsideration . . . constitutes an abuse of discretion." *Villar*, 782 F.2d at 1483.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JOHN WARN, et al.,	)	Nos. 97-55610
Plaintiffs/Appellants,	)	97-56355
vs.	)	
M/Y MARIDOME, et al.,	)	
Defendants/Appellees.	)	ORDER

The motion of appellants Panagiotis Stathopoulos, Robert Stathopoulos, Vera Maria Brigman, and Ilona Brigman-Thiel to withdraw from these appeals is construed as a motion to dismiss their appeals under Fed. R. App. P. 42(b). So construed, the motion is granted. The appeals shall continue as to the remaining appellants.

A certified copy of this order sent to the district court shall act as and for the mandate of this court as to the named parties.

For the Court:

CATHY A. CATTERSON
Clerk of the Court
/s/ Jeffrey L. Crooker
Deputy Clerk

Filed May 27, 1998
pro 5.18

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JOHN WARN, as personal representative of The Estate of Nicholas Warn, decedent; GLORIA WARN-WYETH; LEE WARN; MELANIEWARN;NATHAN WARN;PANAGIOTIS STATHOPOULOS, as personal representatives of The Estate of George Florian Stathopoulos; ROBERT STATHOPOULOS; VERA MARIA BRIGMA; ILONA BRIGMAN-THIEL, aspersonal representative of The Estate ofAndreas Brigman; CHRISTINE WILLSHAW, as personal representative ofThe Estate of Simon Paul Willshaw; FREDERICK WILLSHAW; RICHARD BROOKS, an individual on behalf of himself,

Plaintiffs-Appellants,

v.

M/Y MARIDOME, her Engines, Tackle, Apparel, Furniture and Appurtenances, in rem; MARIDOME MARINE LIMITED, a

Nos. 97-55610
97-56355

D.C. No.
CV-96-01800-
RMB

ORDER

corporation, in personam; JAMES BOOS, in personam; BOSTON WHALER, INC., a corporation, in personam,

Defendants-Appellees.

Before: KOZINSKI and O'SCANNLAIN, Circuit Judges, and DAMRELL,*

The panel has unanimously voted to deny the petition for rehearing. Judge Kozinski and Judge O'Scannlain have voted to deny the petition for rehearing en banc. Judge Damrell recommends that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P.35.

The petition for rehearing and the petition for rehearing en banc are denied.

Filed April 14, 199
by /s/Cathy A. Catterson, Clerk
U. S. Court of Appeals

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*The Honorable Frank C. Damrell, Jr., United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX C

46 U.S.C. § 688

UNITED STATES CODE ANNOTATED
TITLE 46 APPENDIX. SHIPPING
CHAPTER 19-MERCHANT SEAMEN
PROTECTION AND RELIEF

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by, jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of an seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources--including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other then the United States, its territories, or possessions. As used in this paragraph the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person--

(A) under the laws of the nation asserting jurisdiction over the

area in which the incident occurred, or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

Supreme Court, U.S.
FILED
AUG 19 1999
OFFICE OF THE CLERK

(2)

No. 99-139

IN THE
Supreme Court of the United States

MICHAEL JOHN WARN, *et al.*,
Petitioners,
v.

M/Y MARIDOME, her Engines, Tackle, Apparel, Furniture and Appurtenances, *in rem*; MARIDOME MARINE LIMITED, a Corporation, *in personam*, JAMES BOOS, *in personam*, and BOSTON WHALER, INC., a Corporation, *in personam*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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August 19, 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Jones Act applies to claims asserted by foreign plaintiffs for the death of, or injury to, citizens of foreign nations suffered aboard a foreign-owned, foreign-flagged, non-commercial vessel in foreign territorial waters.

RULE 29.1 LISTING

Respondent Maridome Marine Limited has no parent company or non-wholly owned subsidiaries.

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IN THE

Supreme Court of the United States

No. 99-139

MICHAEL JOHN WARN, *et al.*,

Petitioners,

v.

M/Y MARIDOME, her Engines, Tackle, Apparel, Furniture and Appurtenances, *in rem*; MARIDOME MARINE LIMITED, a Corporation, *in personam*, JAMES BOOS, *in personam*, and BOSTON WHALER, INC., a Corporation, *in personam*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondents M/Y MARIDOME (sometimes the "Yacht"), Maridome Marine Limited ("MML"), and Captain James Boos (collectively "Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari (the "Petition") seeking review of the opinion of the Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 169 F.3d 625 (9th Cir. 1999). The District Court's opinion is reported at 961 F. Supp. 1357 (S.D. Cal. 1997).

STATEMENT OF THE CASE

The M/Y MARIDOME (ex STEFAREN) is a 177-foot ocean-going pleasure yacht. The Yacht is registered in the British Registry under the laws of the United Kingdom and flies the British flag. (Pet. App. A-3; Pet. App. B-59). The Yacht is owned by MML, which is a corporation organized and existing under the laws of the States of Jersey, Channel Islands. (Pet. App. A-3; Pet. App. B-59). MML purchased the Yacht in 1992.[1]

The Yacht's ultimate beneficial owner is Enrique Molina, who is a citizen and resident of Mexico. (Pet. App. A-3; Pet. App. B-59). Molina's principal business offices are in Mexico, and he has no offices or businesses in the United States. From the date of her purchase by MML, MML and Molina have used the Yacht for recreational and social purposes, sailing to different parts of the world at Molina's instructions.[2] (C.R. 118(1) at 128; C.R. 118(2) at 51-56, 59).

This suit arose out of a maritime accident that occurred on September 3, 1995 when a tender from the Yacht allided with an unlit, unmarked metal structure maintained by the Government of Greece in the Port of Poros, Greece. As a result of the allision, Petitioners' decedents Nicolas Warn and Simon Willshaw were killed, and Petitioner Richard Brooks was injured. Warn, Willshaw, and Brooks were members of the Yacht's crew at the time of

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[1] Since its incorporation, MML has fully observed the necessary corporate formalities. MML is fully capitalized, owning the Yacht, which it purchased for $22,500,000, without a mortgage.

[2] The Yacht has visited numerous countries in Europe, the South Pacific, and North, Central, and South America. During Captain Boos's captaincy, from February 1995 until the date of suit, the Yacht made seven trips to Mexico, totalling 203 days, four trips to the United States, totalling 55 days, and three trips to British ports, totalling 15 days. (Clerk's Record ("C.R.") 132 at 2-3).

the accident and subjects of the United Kingdom.[3] (Pet. App. A-4; Pet. App. B-59). Warn, Willshaw, and Brooks signed their articles of employment in Barbados, Gibraltar, and St. Martin, respectively, and not in the United States.

Immediately following the accident, on September 5, 1995, relatives of the Greek Plaintiffs filed an application for the arrest of the M/Y MARIDOME in the Court of Piraeus, Greece under the Greek Code of Civil Procedure. The Greek Plaintiffs sought security for the release of the Yacht in an amount commensurate with the amount of damages a court in the United States might award them. The Greek Court denied this request and ordered security in an amount less than the Greek Plaintiffs had sought. Respondents posted the required security, which permitted the Yacht to depart Greece.

Thereafter, the Greek Plaintiffs, joined by Warn's relatives, commenced substantive proceedings against MML, seeking damages under Greek law. MML brought an impleader action against the Greek State for indemnity due to its failure to light or mark the metal structure with which the tender allided. When the Greek Court subsequently denied the Greek State and claimants' request for an adjournment, the claimants withdrew their actions in Greece without prejudice to their reassertion in the future.

Despite the pendency of the Greek court proceedings, Petitioners filed this action against Respondents, in the United States District Court for the Southern District of California, on October 17, 1996 and caused the re-arrest

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[3] Two other individuals killed in the accident were not members of the crew and were dual citizens of Greece and Germany (the "Greek Plaintiffs"). The Greek Plaintiffs were also parties to this action originally but voluntarily dismissed their appeal from the District Court's order.

of the M/Y MARIDOME in the Port of San Diego, California. In this action, Petitioners sought recovery under the Jones Act, 46 U.S.C. App. § 688, Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68, and/or general maritime law. By order dated March 31, 1997, the District Court granted Respondents' motion to dismiss Petitioners' complaint for, *inter alia*, lack of jurisdiction under the Jones Act (i.e., the non-applicability of United States law to their claims) and *forum non conveniens*. The Ninth Circuit affirmed the District Court's dismissal of Petitioners' complaint on both choice-of-law and *forum non conveniens* grounds.

SUMMARY OF ARGUMENT

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), this Court enunciated a flexible, multi-factor test for resolving choice-of-law issues in suits brought under the Jones Act by foreign seamen. Petitioners urge this Court, however, to replace this well-established test with a rigid, single-factor test, which would apply the law of the shipowner's base of operations, to resolve choice-of-law issues. The Petition should be denied because: (1) No conflict exists among the lower courts concerning the application of the multi-factor test, which is applied flexibly to the particular facts of each case; (2) the Ninth Circuit and the District Court held that *none* of the *Lauritzen/Rhoditis* factors, including the base of operations, supported the application of United States law; (3) the Ninth Circuit did not hold that the law of the flag was dispositive or that the base of operations could not be dispositive in the appropriate case; and (4) no commercial policy, foreign policy, federalism, or other policy concern is implicated by the "Question Presented" in the Petition.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH EARLIER OPINIONS OF THIS COURT AND OTHER LOWER COURTS.

In *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970), this Court formulated a flexible, eight-factor test for determining whether United States law applies to the claims of foreign seamen. The factors to be weighed are: (1) place of the wrongful act; (2) law of the vessel's flag; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place of the contract; (6) inaccessibility of the foreign forum; (7) law of the forum; and (8) base of operations of the shipowner. Although *Lauritzen* was a Jones Act case, this Court has extended its test to all cases arising under general maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84 (1959). The lower federal courts have held that the *Lauritzen/Rhoditis* test applies to DOHSA actions as well. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 454 (2d Cir. 1975), *cert. denied sub nom. Hapag-Lloyd, A.G. v. Texaco Panama, Inc.*, 423 U.S. 1052 (1976).

In holding that foreign law governed Petitioners' claims, the Ninth Circuit weighed all of the *Lauritzen/Rhoditis* factors. The Court of Appeals did not rely solely upon the law of the Yacht's flag or hold that "the flag presumptively controls," as Petitioners suggest. (Pet. at 24). Rather, the Ninth Circuit recognized simply that the law of the flag was the only factor it had previously considered "*potentially* dispositive . . ., '*unless* other factors point decidedly in a different direction.'" (Pet. App. B-66 (*quoting Bilyk v. VESSEL NAIR*, 754 F.2d 1541, 1545 (9th Cir. 1985) (emphasis added)). Here, the

Ninth Circuit found, however, that "the law of the flag *and a majority of the other factors* point decidedly in the same direction . . . [i.e., toward the application of foreign law]." (Pet. App. B-66 (emphasis added); *see also* Pet. App. B-64). The Ninth Circuit was plainly correct in so holding.

The Ninth Circuit's opinion is entirely consistent with this Court's holding in *Rhoditis*. In *Rhoditis*, this Court held only that "the shipowner's *base of operations* is another factor of importance in determining whether the Jones Act is applicable; and there well may be others." 398 U.S. at 309 (underlining added). *Rhoditis* did not hold that the base of operations was *the most important* factor. As the District Court noted here, the "Ninth Circuit has consistently weighed all eight of [the *Lauritzen/Rhoditis*] factors, according the most weight to the law of the flag, the shipowner's base of operations, and the citizenship of the injured seamen." (Pet. App. A-25 & n.6 (citing cases)). The lower courts' opinions properly considered the *Lauritzen/Rhoditis* factors in light of this Court's precedent.

The Ninth Circuit's opinion is also in accord with decisions of other circuit courts, including those cited in the Petition. (*See* Pet. at 25-26). As Petitioners themselves admit, the rule in other circuits is only that the base of operations factor "*may* be decisive." (*Id.* at 25 (emphasis added)). In *Gonzalez v. Naviera Neptuno A.A.*, for example, the Fifth Circuit stated that "the base of operations of the defendant *may sometimes* be decisive." 832 F.2d 876, 880 (5th Cir. 1987) (emphasis added). The Fifth Circuit applied foreign law to the claims, in *Gonzalez*, because the defendant, the vessel's flag, and the base of operations were all foreign. *Id.* at 880-81. Similarly, the district court concluded in *Hernandez v. Naviera Mercante, C.A.*, 716 F. Supp. 939, 943

(E.D. La. 1989), that "based upon the Fifth Circuit law, the two most important factors, in a choice of law question, are the flag of the vessel and the vessel owner's base of operations."

The Second Circuit's holding in *Antypas v. Cia. Maritima San Brasilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977), upon which Petitioners also rely, is not to the contrary. (*See* Pet. at 25). *Antypas* involved a factual situation very different from the present case. There, the seaman was injured aboard a commercial vessel owned in part by Americans and engaged in a liner service between United States and foreign ports, which was operated by an American company. *Id.* at 310. Accordingly, the Second Circuit held only that under the facts of that case those contacts with the United States were "substantial and predominate over such factors as the ship's flag, the place of incorporation of the shipowner, and the seaman's nationality." *Id.* The Second Circuit did not announce a general rule elevating the base of operations factor above the other *Lauritzen/Rhoditis* factors in all cases.[4]

The decision by a Florida Court of Appeals in *Rojas v. Kloster Cruise, A/S*, 550 So.2d 59 (Fla. Dist. Ct. App. 1989), also cited by Petitioners, presents another case that is plainly distinguishable on its facts. (Pet. at 25-26). In that case, the shipowner was a Norwegian company that maintained its principal place of business in Miami,

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[4] Both the Fifth Circuit and district courts within the Second Circuit have held that, under the facts of a particular case, other factors may outweigh even a United States base of operations. *See, e.g., Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861-62 (5th Cir. 1983) (per curiam), *overruled in part on other grounds by In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc); *Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 380 (S.D.N.Y. 1996).

Florida, was partly owned by American citizens, and was authorized to do business in Florida. *Id.* at 60 n.2. The shipowners' cruise ship operations accounted for all of its more than $300,000,000 in revenue and were largely based in Miami, which was the home port of its ships and from where all of its cruises sailed. *Id.* As the *Rojas* Court concluded, "it would be hard to imagine a commercial situation in which American interests, to the virtual exclusion of any others, so completely control both the daily commercial operations and the long-term prosperity of the defendant and its vessels. . . . [T]he operation of the defendant's liner is economically indistinguishable from that of a hypothetical United States flag vessel owned by United States interests." *Id.* at 64.

While these facts may have supported the application of United States law in that case, they are very different from the facts in the present case and highlight the difference between a commercial maritime operation and, as here, the use of a recreational vessel. In fact, all of the cases cited by Petitioners demonstrate the importance of the facts of the particular case to the *Lauritzen/Rhoditis* analysis. As this Court recognized in addressing the "superficial" variance in the case law in *Lauritzen*, 345 U.S. at 573 & n.3, "[n]o two of these cases present exactly the same basis for application of American law and their contrary results do not necessarily mean inconsistency. But they illustrate different considerations which influence choice of law in maritime tort cases." The operation of the M/Y MARIDOME, a pleasure yacht, does not present the same facts or concerns as did the large commercial maritime operations involved in the cases Petitioners cite.[5] Regardless, unlike Petitioners' proposed

[5] Accordingly, Petitioners are wrong in asserting that the result in this case would necessarily have been different if they had re-

test, the present test gives courts the flexibility to deal with such disparate factual situations by balancing all eight *Lauritzen/Rhoditis* factors.

Accordingly, the Ninth Circuit, like the Second and Fifth Circuits, has weighed the base of operations factor more heavily than other factors, including the law of the flag, where, unlike here, the facts of the case required. In *Dalla v. Atlas Maritime Co.*, 771 F.2d 1277 (9th Cir. 1985) (per curiam), for example, the Ninth Circuit affirmed the application of United States law to the claims of a foreign seaman. The Ninth Circuit held that:

> The [district] court concluded that the *Lauritzen* and *Rhoditis* factors militated in favor of starting [sic] a Jones Act claim not only because the vessel's base of operations is in the United States but also because the vessel's owners were apparently United States nationals [i.e., the apparent reason the district court determined the base of operations was in the United States] and the injury occurred within the United States. In the context of the facts of this case, the trial judge correctly accorded significant weight to those factors and comparatively less weight to the vessel's [foreign] flag and to the nationality of the injured party and the vessel's operator.

Id. at 1278-79 (distinguishing *Pereira v. Utah Transp., Inc.*, 764 F.2d 686 (9th Cir. 1985), *cert. dismissed*, 475 U.S. 1040 (1986), which found the base of operations was not dispositive under different facts). The Ninth Circuit also declined to follow the law of the flag in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). Petitioners are simply wrong in contending that the Ninth Circuit mechanically applies the law of the flag.

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arrested the M/Y MARIDOME in a different jurisdiction. (*See* Pet. at 26).

II. THE LOWER COURTS HERE CONSIDERED ALL OF THE *LAURITZEN/RHODITIS* FACTORS AND FOUND NONE SUPPORTED APPLICATION OF UNITED STATES LAW.

The "Question Presented" in the Petition is whether a court can give greater weight in conducting the *Lauritzen/Rhoditis* choice-of-law analysis to a vessel's flag of convenience than the shipowner's United States base of operations. The Petition makes clear, however, that Petitioners are really asking this Court to hold that the base of operations is *the* dispositive factor in all cases. In doing so, the Petition rests upon three erroneous presumptions, none of which finds any support in either the decisions below or the record.

First, contrary to Petitioners' suggestion (Pet. at 21), the Ninth Circuit did not ignore the importance of the shipowner's base of operations under the *Lauritzen/Rhoditis* analysis. Instead, the Court of Appeals held that:

> Here, *all* of the *relevant Lauritzen* factors point toward the application of foreign maritime law, rather than the Jones Act: the accident occurred in Greek coastal waters; the Maridome flies a British flag; none of the injured or deceased parties are or were American citizens or domiciliaries; the shipowner is a Mexican citizen and domiciliary; none of the injured or deceased sailors's [sic] employment contracts were signed in the United States; and Greece provides an accessible forum, as evidenced by the action filed in that forum.

(Pet. App. B-64, 65 (emphasis added, footnote omitted); *see also* Pet. App. A-31, 34). The Ninth Circuit concluded, therefore, that "[e]ven assuming that the Maridome's base of operations was in the United States, the weight of the *Lauritzen* factors indicates that foreign law

is applicable rather than the Jones Act."[6] (Pet. App. B-66 (footnote omitted)).

Moreover, the Ninth Circuit did not disregard Petitioners' claim that the base of operations factor alone was sufficient to justify application of the Jones Act, i.e., was dispositive. (Pet. App. B-65). Rather, the Court of Appeals expressly noted that:

> We do not decide today that a United States base of operations alone cannot ever be dispositive; we simply conclude that the factors here pointing toward application of foreign law outweigh the sole factor arguably militating in favor of applying the Jones Act.

(Pet. App. B-66). Importantly, both lower courts also recognized that the base of operations factor was entitled to less weight in a case such as this one, involving a non-commercial, recreational vessel. (Pet. App. A-26 n.6; Pet. App. B-64 (discussing "relevant" factors)). Such a vessel does not derive any profits from any base of operations it may have and, thus, does not compete with United States companies in the manner addressed in *Rhoditis*, 398 U.S. at 310. Petitioners ignored this distinction before the lower courts as they do now in their Petition.

Second, neither of the lower courts found that either MML or the Yacht maintained a base of operations in the United States. As discussed above, the Ninth Circuit reasoned that, regardless of whether MML had a United States base of operations, the United States did not have a sufficient interest for its law to govern Petitioners'

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[6] The District Court also recognized the importance of the base of operations factor in the *Lauritzen/Rhoditis* test even though it too found that the weight of the other factors favored the application of foreign law in this case. (Pet. App. A-24, 25).

claims. The Ninth Circuit did not hold, however, that any such United States base of operations existed. Consequently, the Ninth Circuit's opinion does not provide either a factual or legal basis for addressing the "Question Presented" by the Petition.

Indeed, the District Court specifically held that it could *not* find that MML and/or the Yacht had a base of operations in the United States. The District Court explained that "at the time of the accident, none of the Maridome's operations were being managed out of the United States." (Pet. App. A-32). Even when the Court "examine[d] the shipowner's base of operations for the 18 months prior to the accident, the Court [could not] make a finding that the Maridome's base of operations was in the United States." (Pet. App. A-33). The District Court also noted that "[Petitioners] argue that the place where day-to-day operations are managed is the base of operations. If this is true, then the base of operations is onboard the ship itself [sic] Captain Boos managed the dayto-day [sic] activities of the crew, provisioning the ship, deciding how to sail where Molina directed, and maintaining daily account ledgers." (Pet. App. A-34). Thus, not even the base of operations—the one factor upon which Petitioners rely—supports application of the Jones Act.

Contrary to Petitioners' "Statement of the Case," the record supports the holding that MML and the Yacht had no United States base of operations. (Pet. at 6-12). Petitioners rest their entire argument that a United States base of operations existed upon the activities of Peter Lee from April 1994 to August 1995.[7] MML fired Lee in July 1995 (over a month before the accident) and required him to terminate his relationship with the Yacht

[7] Importantly, although Lee was a United States resident, he was a New Zealand citizen.

by August 15, 1995.[8] Even before his firing, however, Lee's role had been diminishing since the hiring of Captain Boos in February 1995.

Captain Boos was responsible for obtaining food, water, fuel, other provisions, and cruising permits for the Yacht. Captain Boos also did all of the hiring and firing of crew aboard the Yacht. In performing these duties, Captain Boos answered only to MML representatives *in Mexico*, and not to Lee. Thus, even Lee conceded that he had never controlled Captain Boos with respect to such things as hirings and that, in 1995, *all* of his management activities became subject to approval by people *in Mexico*. (C.R. 118(4) at 97, 181). Of course, as captain of the Yacht, Captain Boos also directed and controlled the navigation of the Yacht to the various destinations chosen by Molina *in Mexico*.

Lee's primary responsibilities after moving ashore in March 1994 were simply to collect and forward the Yacht's mail, complete the accountings by adding any shoreside expenses, and send the accountings to MML's John Falb in Mexico for approval and funding. In fact, the financial and accounting activities for the operation of the Yacht were carried out principally aboard the Yacht and in Mexico at MML's offices. The Yacht's purser, Captain Boos's wife, prepared the monthly accountings and forwarded them to MML in Mexico for approval. When the accounts were approved, MML transferred funds from Mexico into MML's NationsBank account. All the money used for the operation of the Yacht came ultimately, however, from Molina's business

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[8] On August 15, 1995, Lee confirmed his termination and that he had "advised the various companies that I have been dealing with that I am *no longer representing the yacht* . . . ." (C.R. 128 at 7 (emphasis added)).

activities and bank accounts in Mexico.[9] (C.R. 118(1) at 105; C.R. 118(2) at 59-60; C.R. 120, Exh. 19). The record plainly supports the District Court's findings that the day-to-day operation of the Yacht occurred aboard the Yacht, Lee handled only month-to-month matters (for a limited period of time), and Molina, in Mexico, made the ultimate decisions about how to operate the Yacht. (Pet. App. A-33).

Third, neither of the lower courts determined that the Yacht's British flag was a "flag of convenience." Both lower courts recognized that the Yacht flew the British flag, and neither adopted Petitioners' argument that the flag was a flag of convenience. (Pet. App. A-23; Pet. App. B-64, 66). As those courts implicitly determined, such a characterization of the Yacht's British flag is inaccurate.

The term "flag of convenience" applies to

> those flag administrations which both grant nationality to foreign-owned ships *and* have in place sufficiently laissez-faire policies—particularly with regard to nationality and union affiliation of seafarers—to ensure that these ships are able to operate at significantly lower costs than those flying the "traditional" flags of the developed States.

Frank L. Wiswall, Jr., *Flags of Convenience, in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 107, 108 (William A. Lovett ed., 1996) (emphasis added). *See also* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions,* 68 TEX.

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[9] Just as before the lower courts, Petitioners claim, without any support from the record, that MML funded its NationsBank account from Molina's assets in the United States. This allegation is simply incorrect.

L. REV. 937, 939 n.12 (1990) ("A 'flag of convenience' refers to flying the flag of a country in which an owner registers a ship to avoid the labor and safety regulations, fees, and taxes imposed on ships registered in the United States."). Contrary to Petitioners' contention, foreign ownership alone does not necessarily mark a vessel's flag as one of convenience.[10] (Pet. at 23-24).

Here, the Ninth Circuit implicitly rejected Petitioners' argument that the Yacht had no contacts with the United Kingdom and, therefore, the Yacht's flag was one of convenience. The Ninth Circuit noted that a British Channel Islands company (MML) owned the Yacht, the Yacht's hull and protection and indemnity insurance were placed with insurers in the United Kingdom, and the Petitioners represented British sailors "whose contracts of employment were apparently signed within the British Commonwealth."[11] (Pet. App. B-66). In addition, the Yacht's classification was maintained with Lloyd's Register, a British classification society, and the Yacht had complied with all of the regulatory requirements of the British Department of Transportation. Finally, of the 65 crewmembers who served aboard the Yacht from March 1993 to December 1996, approximately 40 percent were sub-

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[10] For example, as one author has commented, "the United States, in granting U.S. nationality and Flag to 11 Kuwaiti-owned ships in 1987 during the 'tanker war' in the Gulf, was not referred to as an FoC [i.e., flag of convenience] because the legal and economic strictures imposed upon U.S.-Flag shipping ensured that these foreign-owned ships could not operate at significantly lower costs than other U.S.-Flag ships." Wiswall, *Flags of Convenience* at 108-09.

[11] Actually, only two of the seamen signed their articles of employment in British Commonwealth territories (Barbados and Gibraltar). The third signed his articles in St. Martin, which is not a British Commonwealth territory.

jects of the United Kingdom—more than from any other single country and over three times as many as from the United States.

Regardless, the British flag has never been considered a flag of convenience. The United Kingdom is a traditional maritime nation, which does not maintain an open registry.[12] *See generally* H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives,* 21 TUL. MAR. L.J. 139, 140 n.5, 151-58 (1996). Research has revealed no United States court decision that has ever recognized the British flag as a flag of convenience. Moreover, as the various definitions of this term make clear, it has significance primarily, if not entirely, in the sphere of commercial, not recreational, shipping.

III. THE NINTH CIRCUIT'S OPINION PROPERLY BALANCES THE APPLICABLE CONGRESSIONAL AND JUDICIAL POLICY CONSIDERATIONS.

This case involves claims on behalf of foreign seamen against a foreign pleasure yacht and its foreign owner, which do not implicate any commercial policy, foreign policy, federalism, or other policy concerns of the United States. Although Petitioners contend that important policies require review, they cite no cases from any court in which the Jones Act has been applied to foreign seamen serving aboard a foreign, *non-commercial* vessel, such as the M/Y MARIDOME. (Pet. at 27-29). Likewise, Petitioners cite no cases that have extended the liberal policies underlying the Jones Act to such seamen.

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12 Notable flags of convenience are: The Bahamas, Barbados, Belize, Cyprus, Honduras, Liberia, Malta, Marshall Islands, Mauritius, Panama, St. Vincent & The Grenadines, Sri Lanka, and Vanuatu. Wiswall, *Flags of Convenience* at 109 & n.6.

Rather, Petitioners contend initially that the Jones Act should be applied to their claims because Respondents have supposedly accepted "the benefits of basing their operations in the U.S." (*Id.* at 27). In support of this argument, Petitioners rely solely upon language from the District Court's opinion addressing whether MML had sufficient *minimum contacts* with the United States for the court to exercise personal jurisdiction over MML. (*Id.*) The *Lauritzen/Rhoditis* test is not, however, a minimum contacts test. *Bilyk,* 754 F.2d at 1544. Regardless, the District Court found further that MML's various contacts with the United States did not establish a base of operations here sufficient for application of the Jones Act even if they did establish personal jurisdiction over MML. (Pet. App. A-32, 33, 34).

This Court rejected reasoning similar to Petitioners' in *Lauritzen*:

> Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of seaborne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

345 U.S. at 581. The fact that the M/Y MARIDOME may have had some contacts with the United States, such as buying goods and services or receiving mail here, does not provide a basis for applying United States law. In *Lauritzen* and *Rhoditis,* this Court outlined the factors to be

considered in determining whether a shipowner's and vessel's contacts with the United States require the application of the Jones Act, as opposed to the exercise of personal jurisdiction. As the lower courts properly held, those contacts are not present here.

Petitioners' second policy rationale for applying the Jones Act to their claims is equally unavailing. Petitioners suggest that this Court should grant review because of the supposed interests of American seamen—none of whom was involved in the accident at issue. (Pet. at 27-28). Whether United States law would have applied to the claims of an American seaman injured or killed in this accident is both unknown and irrelevant. The federal courts have expressly rejected such calls for the application of United States law to the claims of foreign seamen based upon the treatment that might have been accorded to an American seaman in the same situation:

> We know of no authority for the view that foreign nationals may predicate a right to have American law applied on the rights of similarly situated American citizens. The suggestion that one follows from another is another "variety of social jingoism, which presumes that the 'liberal purposes' of American law must be exported to wherever our multinational corporations are permitted to do business."

Phillips, 632 F.2d at 89 (citation omitted). *See also Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1518-19 (11th Cir. 1985); *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 902 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

Moreover, despite its broad language, "courts have never applied the Jones Act as broadly as a literal reading of it would require." *Phillips*, 682 F.2d at 84. Instead, as this Court has held, the Jones Act applies "only to

areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Lauritzen*, 345 U.S. at 577. It was, indeed, because the Jones Act does not, in fact, apply to "any seaman" that this Court enunciated the applicable choice-of-law factors to be considered in evaluating the claims of foreign seamen under the Jones Act in *Lauritzen* and *Rhoditis*.

Petitioners' citation to the 1982 amendment to the Jones Act (adding subsection (b) to 46 U.S.C. App. § 688) as support for this supposed policy rationale does not withstand scrutiny. (Pet. at 28). Although in debating that amendment some members of Congress expressed their concern that it would result in the loss of American jobs, Congress rejected this notion in passing the amendment. In fact, a number of Congressmen specifically refuted the idea that the amendment would harm American workers in any way. 128 CONG. REC. 25423 (statement of Rep. Biaggi), 25424 (statement of Rep. Breaux), 25426 (statement of Rep. Boggs), 25427 (statement of Rep. Biaggi) (1982). Thus, the passage of the 1982 amendment, which rejected Petitioners' reasoning, in no way supports review in the present case.

Likewise, the fact that the amendment was limited to foreign seamen employed on the continental shelf of foreign nations in the oil and gas industry does not reflect any policy necessitating review in this case. The House of Representatives' debate makes clear that the amendment was tailored to address only that specific situation and to codify the courts' prior treatment of the claims of such workers. *Id.* at 25422 (statement of Rep. Biaggi). Congress left the remainder of cases involving foreign seamen to be decided by the courts under the multi-factor *Lauritzen/Rhoditis* analysis.

Petitioners ask this Court to review the present case, however, so as to replace this Court's flexible, multi-factor choice-of-law test with a single-factor base of operations test. In doing so, Petitioners demonstrate that their primary purpose is changing the result in this case and not in protecting any policy concerns. The strength of the present *Lauritzen/Rhoditis* test is that by weighing its eight factors, as the Ninth Circuit did, courts are able to address choice-of-law questions in maritime cases presenting various factual scenarios. As this Court noted in *Rhoditis*, the "*Lauritzen* test, however, is not a mechanical one. . . . The significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction." 398 U.S. at 308-09 (citations and footnote omitted).

The lower courts, such as the Ninth Circuit here, have followed this Court's instruction in *Rhoditis* in weighing the *Lauritzen/Rhoditis* factors in a flexible manner designed to address the peculiar factual and policy situations presented by different cases. *Compare Kukias v. Chandris Lines, Inc.*, 839 F.2d 860, 862-64 (1st Cir. 1988) (place of the wrongful act was not a significant factor and other factors outweighed alleged United States base of operations where seaman was injured aboard cruise ship) and *Koke v. Philips Petroleum Co.*, 730 F.2d 211, 218-20 (5th Cir. 1984), *overruled in part on other grounds by In re Air Crash*, 821 F.2d at 1163 n.25 (place of injury and seamen's allegiance outweighed United States ownership of vessel and possible base of operations where seamen were injured aboard semi-submersible rig). The flexibility of the *Lauritzen/Rhoditis* test has also permitted its application beyond the maritime personal injury/wrongful death realm to other maritime actions as well. *See, e.g., Carbotrade S.p.A. v. Bu-*

reau Veritas, 99 F.3d 86, 91 (2d Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (misrepresentation); *Rainbow Line, Inc. v. M/V TEQUILA*, 480 F.2d 1024, 1026 (2d Cir. 1973) (maritime liens).

Ultimately, it is apparent that the Ninth Circuit properly applied and evaluated the eight *Lauritzen/Rhoditis* factors in a manner consistent with this Court's decisions and those of other circuits. No court has adopted the inflexible approach Petitioners urge this Court to adopt. The *Lauritzen/Rhoditis* test requires no adjustment, in part, because it already permits courts to weigh factors, such as the base of operations, more heavily when appropriate. Here, however, as in *Lauritzen*, the facts simply provide "no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters." *Lauritzen*, 345 U.S. at 593.

CONCLUSION

Petitioners have failed to demonstrate any conflict among the lower federal or state courts on the application of the *Lauritzen/Rhoditis* test to warrant review here. The cases reveal, instead, that the courts consider all of the factors, according different weight to different factors depending upon the facts of the case. Moreover, neither of the lower courts here found that any of the *Lauritzen/Rhoditis* factors, including Respondents' base of operations, supported the application of United States law to Petitioners' claims. Finally, Petitioners have cited no commercial policy, foreign policy, federalism, or other policy concern that requires revamping this Court's choice-of-law test. Accordingly, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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No. 99-139

In The
Supreme Court of The United States
October Term 1998

MICHAEL JOHN WARN, et al.,
Petitioners,

v.

M/Y MARIDOME, et al.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

REPLY TO THE BRIEF IN OPPOSITION

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"The facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States."
Hellenic Lines, Ltd. v. Rhoditis (1970) 398 U.S. 306, 310.

SUMMARY OF ARGUMENT

The Petition should be granted for three reasons. First, the case was wrongly decided. The shipowner in this case is Mexican. The District Court's factual findings establish a United States base of operations as a matter of law. The Maridome's British flag was thus part of the "facade of the operation" since it reflected neither the vessel's ownership nor its base of operations and was selected solely for tax-haven reasons. The Ninth Circuit opinion in this case violates both the holding and the principles of *Rhoditis* by making the facade of the operation more important than the Respondents' actual operational contacts with the United States.

Second, Respondents' assertion that the Ninth Circuit decisions applying the *Lauritzen-Rhoditis* standards are consistent with the opinions of other circuits and state courts is demonstrably untrue. While the Ninth Circuit continues to hold that "the law of the flag presumptively governs" (Apdx. B-65), courts in other Circuits and states read *Rhoditis* to hold, and hold themselves to the contrary, that the law of the vessel's base of operations usually takes precedence. The Petition should be granted so that this court can resolve this conflict and provide the courts below with needed guidance in how to weigh the *Laurtizen-Rhoditis* jurisdictional factors.

Third, the Petition should be granted so that this Court can address the relevance of flags of convenience to the *Laurtizen-Rhoditis* jurisdictional analysis. Petitioners assert that flags of convenience should be entitled to little weight in the jurisdictional analysis because they are part of the facade of a vessel's operation. Respondents apparently contend, to the

contrary, that a vessel's flag should be entitled to great weight, even though it is a flag of convenience. This Court has never before addressed this issue; there is little lower court authority on the subject of flags of convenience; and the Circuit and District courts below avoided the issue entirely in rendering their decisions.

ADDITIONAL RELEVANT FACTS

Respondents recitation of the proceedings in Greece is incomplete and misleading. The Maridome was never arrested in Greece. It fled the jurisdiction with criminal proceedings pending against it before the arrest warrant could be served. None of the Petitioners in this action ever obtained any security against the Maridome or its owners in Greece, and only one of the three Petitioner families ever attempted to proceed against Respondents in Greece. Petitioners sued and arrested the Maridome the only place they could find it, in the United States.

THE RECORD ESTABLISHES A UNITED STATES BASE OF OPERATIONS

A ship has a base of operations in the U.S. if both the vessel and the shipowner have "substantial and continuing contacts" with this country. *Rhoditis*, 398 U.S. at 310. A vessel's base of operations is where the "day-to-day operational decisions" are made, the location where "the day-to-day operation was conducted and supervised" and not the base of the owner who only is "involved in monitoring and controlling the overall operations. "*Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 88 (9th Cir. 1980)[emph. added].

The district court found that the Maridome's agent, Peter Lee, "...managed the Maridome out of his home in Virginia. MML provided Lee with a power of attorney which allowed him to manage all aspects of the Maridome, save selling or mortgaging it." (Apdx. 15). "In fact, MML's agent managed the day-to-day operations of the corporation's largest asset, the

Maridome, from an office in the United States"[emph. added] (Apdx. A-16,17).

Since the vessel's base of operations is the location from which "...the day-to-day operation was conducted and supervised", the District court's finding that Lee managed the day-to-day operations from the United States is dispositive. It compels the conclusion that the vessel's base of operations was the United States. *Phillips*, 682 F.2d at 88.

The District Court further found that Lee's management activities were pervasive and all-encompassing, that Lee was paid $100,000 annually for his services and that he continued managing the Maridome until just two days before the accident. (Apdx. A-6, 7).[1]

Respondents' assertion that Lee's management was limited to collecting mail and forwarding accountings simply ignores the District Court's contrary findings regarding the Maridome's United States' base of operations which included thirty hour per week U. S. management, U.S. banking [2], insurance brokers, suppliers, satellite service, and U.S. installation of the Boston Whaler. (Apdx. A-7, 8). Indeed, the Maridome conducted all of its important commercial contacts through operations established in the U.S. and represented to all commercial entities with which it

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[1] Up to and through the date of the accident, Lee was the only individual legally authorized to act on the vessel's behalf. (Clerk's Record ("C.R.") 120, Exh. 2).

[2] At n.9 of their Opposition, Respondents wrongfully accuse Petitioners of misciting the evidence by asserting that the Maridome was funded from Molina's assets in the U.S. That is precisely what Molina testified -- that funds for the Maridome operations were provided from Molina's personal Texas bank account at NationsBank. (C.R. 118(2) at 57-59; C.R. 120, Exh 19).

interacted that it had an American base. Moreover, the Maridome retained its American base of operations long after the accident by continuing to operate under the American based commercial relationships Lee had established for the ship's supplies, insurance, address, banking, satellite communications, etc. These operations remain in the U.S. to this day.

There is no evidence in the record to support a contrary finding that the vessel's base of operations was either "on board" or in Mexico. Obviously, every ocean going vessel's operations are managed, to some extent, from the vessel itself. The Maridome travels the world. Under the erroneous "on board" approach, the Maridome's legal base of operations would change as it entered the waters of each different country, and it would have no legal base of operations for purposes of injuries incurred while in international waters. With respect to a Mexican base of operations, Respondents testified that neither the vessel's owner, Molina, nor his assistant in Mexico were ever involved in the day-to-day operations or management of the vessel. (C.R. 95 at 3; 120(1) at 55). Accordingly, Mexico cannot be the vessel's base of operations.

THE NINTH CIRCUIT'S OPINION IS INCONSISTENT WITH SECOND AND FIFTH CIRCUIT OPINIONS AS WELL AS STATE COURT OPINIONS

Contrary to Respondent's assertion, a clear conflict exists between the Ninth Circuit on the one hand and other Circuit and state courts on the other concerning the application of the eight-factor test established by this Court for determining whether United States law applies to the claims of foreign seamen. In particular, a conflict exists between the Ninth Circuit, which begins its analysis with the assumption that the law of the flag "presumptively governs" and the courts of the Second and Fifth Circuit (and the state of Florida) which begin their analysis with the assumption that the law of the vessel's base of operations controls, absent compelling facts to the contrary. While

Respondents deny that any such conflict exists, the District Court certainly recognized one: "Plaintiffs are correct that courts in the Second and Fifth Circuits have given greater weight to the shipowner's base of operations." (Apdx. A-25, n. 6).

Respondent's refusal to acknowledge the Ninth Circuit rule that "the flag presumptively controls" (Opp. at 5) is particularly puzzling in light of the Ninth Circuit's description of its own decision in *Pereira v. Utah Transport Inc.*, 764 F.2d 686 (9th Cir. 1985): "holding that the Jones Act was inapplicable despite a United States base of operations because the law of the flag presumptively governs..." (Apdx. B-65).

The law in the Fifth Circuit could not be more explicitly to the contrary. "The determination of whether American or foreign law applies turns substantially on the base of operations of the vessel owner. Gonzales v. Naviera Neptuno, 832 F.2d 876 (5th Cir. 1987)." *Hernandez v. Navierra Americante CA*, 716 F.Supp 939, 943 (E.D. LA. 1989).[3]

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[3]Respondents' assertion (Opp. at 7, n. 4) that courts within the Fifth and Second Circuit have held that other factors may outweigh a United States base of operations is incorrect. Neither of the cases cited by Respondents, *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 5th Cir. (1983) (per curiam), *overruled in part on other grounds by In Re: Air Crash Disaster Near New Orleans, LA., 821 F.2d 1147 (5th Cir. 1987)* (en banc) nor *Ioannides v. Marika Maritime Corp.*, 928 F.Supp 374 (SDNY 1996) support Respondents' assertion. No United States base of operations was found in *Fajardo* because the defendant vessel had never visited U.S. waters. As the *Fajardo* court correctly noted, "the 'close objective look' at the 'actual operational contacts' which is demanded of us by *Rhoditis* must be directed at both the shipowner and at the ship [emphasis in original]. *Fajardo*, 707 F.2d at 862. *Ioannides* dealt entirely with forum non-conveniens issues, not jurisdiction under the Jones Act. There was no finding or holding in *Ioaniddes* that the Jones Act would not apply in the event of a U.S. base of operations.

Like the courts in the Fifth Circuit, state courts have expressed the belief that *Rhoditis* requires the exercise of Jones Act jurisdiction where a substantial United States base of operations has been established.

> "We think that *Rhoditis* establishes the rule that existence of substantial contacts including the existence of an extensive base of daily operations in the United States -- even when they are less significant than those present here -- itself and alone requires the application of our law to the particular case. This is shown by a series of decisions which so hold, even after a mandated consideration of all the pertinent factors has yielded an overwhelming predomination to the contrary."

Rojas v. Kloster Cruz A/S, 550 So.2d 59, 63 (Fla.App. 1989)

Petitioners are not suggesting an inflexible standard, as Respondents contend. Petitioners simply advocate the jurisdictional approach adopted by the Second and Fifth Circuits, and the Florida State courts. It is the Ninth Circuit's approach which inflexibly gives precedence to the law of the vessel's flag whether or not the flag bears any relation to the vessel's ownership or operations.[4]

FLAGS OF CONVENIENCE SHOULD BE ACCORDED LITTLE WEIGHT IN THE JURISDICTIONAL ANALYSIS

Post-*Rhoditis* decisions have established that a vessel's flag and

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[4] Respondents cite *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir 1980) as an example of a case where the Ninth Circuit did not mechanically apply the law of the flag. It is more than a little curious that, in *Phillips*, the court used the existence of a foreign base of operations to deprive foreign seamen on an American flagged vessel of access to American courts. This is precisely the type of result-oriented decision making which this court should address by explicating the proper method of analyzing the *Lauritzen/Rhoditis* jurisdictional factors.

its base of operations are the two weightiest factors. Giving great weight to the flag where it reflects either the vessel's true ownership or its base of operations is sensible. However, if, as here, the flag represents neither the vessel's actual ownership nor its base of operations, then it is nothing more than part of the "facade" of the operation which "must be considered as minor." *Rhoditis*, 398 U.S. at 310. In such a case, the rule established in the Fifth Circuit should apply: The choice of law should turn "substantially on the base of operations of the vessel owner." *Hernandez*, 716 F.Supp. at 943.

No federal court, to the best of Petitioners' knowledge, has defined "flag of convenience." Contrary to Respondents' assertion that the District and Circuit courts determined (*sub silentio?*) that the Maridome's was not a flag of convenience, neither court addressed the issue at all. Under Tetley's definition, the Maridome flies a flag of convenience because it flies the flag of one country while being owned and operated from others. (Pet. at 23). Respondents argue that the Maridome's flag does not meet the definition established by the commentators they rely upon (Opp. at 14-15).[5]

Regardless of whose definition is applied, the relevance of flags of convenience to the choice of law analysis is that the flag should be given little weight where, as here, it is part of the facade of the operation, i.e. where it does not reflect either the vessel's

[5]In fact, the Maridome does meet Respondents' commentors Robertson & Speck's definition: the flag of a country in which the owner registers a ship to avoid, *inter alia*, U.S. taxes. (Opp. at 14-15). In this case Molina admitted he established the Maridome in the Channel Islands specifically because they were a tax haven. (CR 118 (2) at 24).

ownership or its operational base.[6] The lower courts clearly need guidance on this issue. It is all well and good to espouse a "flexible" test, but an overly flexible test leads to inconsistent, result oriented, essentially standardless decision making. Unfortunately, that is the present state of Jones Act jurisprudence under *Lauritzen/Rhoditis*. Different courts have adopted different presumptions with which to begin the analysis. Not surprisingly, those presumptions have led to inconsistent results in cases presenting substantially similar facts.[7]

This case is virtually indistinguishable from *Rhoditis* on its facts, except for the location of the injury ("not emphasized", *Villar*, 782 F.2d at 1480) and the absence in this case of any foreign employment contract (also of minor weight). Respondents' attempt to draw a material distinction between commercial and

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[6]The Circuit Court below had no difficulty finding that the actual shipowner was Mexican citizen Molina, not the shell Channel Islands corporation he established with $2 of paid-in capital. (Apdx. B-64). (C.R. 120, Exh. 1 at 1-3). Respondents' assertion that the shell corporation was "fully capitalized" and "observed the necessary corporate formalities" (Opp. 2, n.1) is puzzling. One may legitimately ask how a entity with $2 of total capitalization could purchase a $22.5 million yacht, without a mortgage, in the absence of egregious commingling of funds between the shell entity and its true owner.

[7]See, e.g., the cases cited at n. 1 of the Petition, all of which held the Jones Act applicable where foreign seamen sailing on foreign flagged vessels were injured in accidents occurring outside the United States. There simply is no reasoned basis upon which the injured seamen in each of those cases could have been permitted to assert claims under U.S. law while denying Petitioners herein the same right.

pleasure crafts will not hold water.[8] Their claim that the Maridome is simply a pleasure yacht for Molina's personal enjoyment ignores how wealthy executives like Molina do business and is not supported by the record. While the Maridome may be a pleasure yacht, it also serves as an executive suite for Molina's business activities. Molina is the C.E.O. of a New York Stock Exchange Company. He uses the Maridome to entertain high ranking U.S. business executives and bankers. It is naive and unrealistic for Respondents to argue that such activity does not constitute "business activity" or "commerce" at the highest corporate levels. It is certainly no accident that the Maridome made twice as many visits to U.S. ports as to the ports of any other country during the relevant period of time. (C.R. 115 at 2).

Finally, Respondents have misconstrued Petitioners' policy argument. Petitioners do not assert that foreign seamen should have the same rights as American seamen or that all foreign seamen should have access to U.S. courts. Petitioners simply contend that when foreign vessel owners decide to base their operations in the United States and thereby reap all the advantages of U.S. based management, banking, and commercial relationships of every conceivable description, they should be held answerable under U.S. law for injuries they cause to their seamen, whether American or foreign. To hold to the contrary that U.S. based vessels can avoid Jones Act jurisdiction by hiring foreign seamen only provides a disincentive to hire Americans that is contrary to the policy of the Jones Act.

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[8]The lack of cited cases involving pleasure yachts is easily explained. There are relatively few pleasure yachts making trans-oceanic voyages in comparison with commercial vessels. However, the relative infrequency of such voyages is no reason to carve out a special rule for seamen on pleasure yachts. The Jones Act is for the benefit of seamen without regard to the type of vessel that employs them.

CONCLUSION

Petitioners respectfully submit that their petition should be granted for each of the reasons set forth in the petition and reply.

Respectfully Submitted,

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